









Digitized by the Internet Archive  
in 2015







Law  
Repts.  
Cu

Upper Canada Reports Kings or Queen's  
Bench

I

(90)

QUEEN'S BENCH  
AND  
PRACTICE COURT  
REPORTS.

---

BY  
JAMES LUKIN ROBINSON, ESQ.  
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

---

VOL. IV.  
CONTAINING THE CASES DETERMINED  
FROM HILARY TERM, 10 VICT., TO MICHAELMAS TERM, 11 VICT.:  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

---

TORONTO:  
HENRY ROWSELL.

---

1848.

308751  
7 1 33





J U D G E S  
OF  
THE COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HON. JOHN BEVERLEY ROBINSON, C. J.  
" JAMES BUCHANAN MACAULAY,  
" JONAS JONES,  
" ARCHIBALD McLEAN,  
" WILLIAM HENRY DRAPER.

---

*Attorneys-General :*

HENRY SHERWOOD.  
ROBERT BALDWIN.

---

*Solicitors-General :*

JOHN HILLYARD CAMERON.  
WILLIAM HUME BLAKE.



## TABLE

OF THE

NAMES OF CASES REPORTED IN THIS VOLUME.

A.		PAGE.	
Acheson v. McKenzie .....	230	Campbell v. Cushman .....	9
Adams v. Bains.....	157	“ v. Black et al. ....	488
Allan v. Garven.....	242	Commercial Bank v. Hughes et al.	167
Anderson v. Hamilton .....	372	“ v. Eccles.....	336
Appleton et al. v. Dwyer, abscond- ing debtor .....	247	Corbett v. Calvin .....	123
Armour, Assignee of Boyd, &c., v. Phillips .....	155	Corner v. McKinnon.....	350
Armstrong v. Anderson et al. ....	113	Cox v. Hand .....	281
		“ v. Cox.....	207
		Cuvillier et al. v. Browne .....	105
B.		D.	
Baby v. Foott, Sheriff .....	349	Davis v. Moore et al.....	209
Bacon v. McBean et al. ....	104	Doe dem. Brennen v. O'Neill .....	8
Baldwin, qui tam., v. Henderson...	361	“ Matlock v. Disher .....	14
Bank of Upper Canada v. Smith... 483		“ Earl of Mountcashel v. Grover .....	23
“ v. Gwynne et al.....	145	“ Wheeler v. McWilliams	30
“ v. McFar- lane et al.	396	“ Piquotte v. Piquotte ...	101
Beamer v. Darling .....	211	“ Vancott v. Read .....	125
“ v. “ .....	249	“ Burrett v. Dunham .....	99
Beatty v. McIntosh et al.....	259	“ Bowman et al. v. Came- ron et al.....	155
Beckett v. Cornish.....	138	“ McDonald v. Long .....	146
“ v. Oill .....	489	“ Dodge v. Rose.....	174
Belcher v. Cook.....	401	“ De Reimer v. Glass.....	255
Bellows v. Condee.....	346	“ Lyon v. Legé .....	360
Benedict v. Boulton et al.....	96	“ Henderson v. Roe .....	366
Bentley v. West.....	98	“ Place et al. v. Skae .....	369
Boulton v. Cooper.....	278	“ Marr v. Watson .....	398
Bradley v. Crane .....	122	“ Eberts and wife v. Wil- son .....	386
Bridges v. Case .....	127	“ Jarvis v. Cumming.....	390
		“ McPherson v. Hunter... 449	
		“ Kenny and wife v. John- son .....	508
		“ Hagerman v. Strong et al.	510
C.			
Cameron, Administrator, v. For- syth et al. ....	189		
Cameron v. Lount.....	275		

	PAGE.		PAGE.
Doe dem. Richardson v. Dafoe ...	484	Lapenotiere, Mandamus, in re ...	492
“ Cuvillier et al. v. James	490	L’Esperance v. Clark .....	12
Dowding v. Eastwood .....	217	Liddell v. Monro .....	474
Duncombe v. Fonger et al. ....	192	Long v. Lee .....	377
Dunning v. Gordon .....	399	Low et al. v. Ottawa District Council	194
E.		Lunn v. Turner et al. ....	282
Eccles v. Moodie, Sheriff, et al. ...	250	M.	
Edwards v. Holmes .....	94	Macklem et al. v. McMicking.....	264
Evans v. Kingsmill .....	132	Maddock v. Stock .....	118
Everett v. Whiteford.....	261	“ v. Corbett .....	257
F.		Mair v. Holton .....	505
Ferrie et al. v. Lockhart .....	477	Malloch v. Johnston.....	352
Fisher et al. v. The City of King-		“ v. Anderson .....	481
ston .....	213	Mandamus, in re Lapenotiere .....	492
Foott v. Bullock .....	480	Marsh v. Boulton .....	354
Fowler v. Hooker et al. ....	18	Marter v. Digby .....	441
French v. Kingsmill, Sheriff .....	215	Masecar v. Chambers et al. ....	171
G.		Milburn v. Milburn .....	179
Geddes v. Rogers .....	235	Millard v. Kirkpatrick.....	248
Gibb v. Miller .....	113	Milmine v. Hart .....	525
“ v. Morisette .....	205	Moffatt v. McMartin.....	256
Gilmour et al. v. Wilson et al.....	154	Monahan v. Foley.....	129
Gleeson v. Wallace .....	245	Monforton v. Monforton et al.....	338
H.		Moodie, Sheriff, v. Bradshaw .....	199
Haywood v. Harper .....	489	Mouck v. Stewart .....	203
Heather v. Wardman .....	173	Murphy v. Fraser .....	194
Henderson v. Beekman .....	150	Mc.	
Hunter v. Thurtell et al. ....	170	McDonald v. Cameron .....	1
Huntly v. Smith, Sheriff .....	181	“ v. McDonald .....	133
I.		McDonell v. Kelly.....	394
Ireland v. Wagstaff et al.....	231	McGill v. Proudfoot .....	33
J.		“ v. “ .....	40
Jackson v. Simpson .....	287	McGillivray v. Keefer .....	342
James v. Mills .....	366	“ v. Keefer .....	459
Jordan v. Marr .....	53	McIntyre v. The City of Kingston	471
K.		McLean v. Knox.....	52
Kesar v. Empey et al.....	47	N.	
Kelly v. Baldwin .....	143	Neeson v. Eastwood et al.....	271
Kennedy et al. v. Brodie .....	189	O.	
Kenny v. Armstrong .....	196	O’Connor v. Hamilton, Sheriff.....	243
“ v. Cook et al. ....	268	Ogilvie et al. v. Kelly .....	393
Kitson v. Short .....	220	Oliphant v. McGinn .....	170
L.		O’Neill v. Hamilton, Sheriff.....	294
Lane v. Stennett .....	440	O’Reilly v. Moodie, Sheriff .....	266
Lane et al. v. Small .....	448	P.	
		Passmore v. Harris .....	344



## TABLE OF CASES.

V

	PAGE.
Patterson v. Attrill et al. ....	395
Perrin et al. v. Eaglesum.....	254
Perry v. The British America Fire and Life Assurance Company ...	330
Pollock et al. v. Fraser, Sheriff ...	352
Prindle v. McCan et al. ....	228

## R.

Ramsay et al. v. West. Dist. Council	374
Reid v. Hilts et al.....	175
Reynolds v. O'Brien.....	221
Ritchey v. The Bank of Montreal	222
“ v. “	456
Robinson v. Rapelje, Sheriff .....	289
Ross et al. v. Burton.....	357
Rudolph v. Bernard .....	238
Rules of Court .....	81

## S.

Sanderson v. Coleman .....	119
Sanderson & Murray v. The King- ston Marine Railway Company	340
Shirley, Superintendent Common Schools, v. Hope .....	240
Sir James McGregor et al., Execu- tors, v. Gaulin et al. ....	378
Small, Coroner, &c., v. Biggar.....	497
Sligh v. Campbell.....	255
Smith v. Oates .....	185
“ v. Davidson.....	191
Stafford v. Williams .....	488
Sutherland v. Murphy .....	176

## T.

	PAGE.
Taylor v. Carr .....	149
The Bank of Upper Canada v. Gwynne et al.....	145
The Bank of Upper Canada v. McFarlane et al. ....	396
The City of Kingston v. Brown ...	117
The City of Toronto and Lake Huron Railroad Company v. The Hon. G. Crookshank.....	309
The Huron District Council v. The London District Council .....	302
The Queen v. The Board of Police of Niagara .....	141
“ v. Brown .....	147
“ v. Cameron .....	165
“ v. Tomb.....	177
“ v. Smith, Treasurer Midland District ...	322
“ v. Biggar .....	497
Thirkell v. Strachan.....	136
Thomas, Sheriff, v. Johnston et al.	110
Thomas v. Hilmer.....	527
Tossell et al. v. Dick et al. ....	486
Tyler v. Babington .....	202

## W.

Waltenberger v. McLean et al. ...	350
Watson v. The City of Toronto Gas Light and Water Company	158
White v. Church .....	23
Whyatt v. Marsh .....	485
Wilkins v. Peck.....	263



REPORTS OF CASES  
IN THE  
QUEEN'S BENCH AND PRACTICE COURTS.

*Hilary Term, 10 Victoria.*

---

McDONALD v. CAMERON.

In actions for torts, the court will not set aside a verdict for excessive damages, except upon very clear and manifestly strong grounds.

A party cannot be prosecuted, under our criminal statute 4 & 5 Vic. ch. 25, for stealing fruit "growing in a garden," unless the bough of the tree upon which the fruit is hanging be *within* the garden. It is not sufficient that the *root* of the tree be within the garden.

In an action for false imprisonment, on an alleged charge of theft, the record of a criminal conviction before a magistrate is not *conclusive* evidence—if evidence at all—to prove the fact of the plaintiffs' guilt, especially when the civil action is brought by one who was no party to the criminal proceeding.

Trespass for assaulting and wrongfully imprisoning the daughter of the plaintiff, on a false charge of theft, alleging loss of service in consequence.

The defendant pleaded, 1st, not guilty.

2ndly, justification, under the statute for the summary punishment of petty thefts; setting forth that the plaintiff's daughter, on the 5th day of August, 1845, stole a quart of gooseberries, of the value of two-pence, of the property of the defendant, then growing in a garden of the defendant; that he, finding her stealing the said fruit in the garden, and as the owner thereof, immediately apprehended her and took her into custody, under the authority of the statute, and afterwards gave her in charge to a constable, who took her before a justice, to be dealt with according to law, which are the same trespasses, &c.

The plaintiff replied to this special plea, that the plaintiff's daughter (Bridget McDonald) did not steal the fruit in the said 2nd plea mentioned, or any part thereof, in manner and form as the defendant had above in his said 2nd plea alleged.

Upon the trial, a verdict was given for the plaintiff; 6*2*l. 10*s*. damages.

The plaintiff had brought a former action for the same alleged injury, and was non-suited for the omission to give notice of action, as directed by the statute; and being still within the six months, the time limited by the act, he gave a proper notice, and brought the second action.

The plaintiff's daughter was a child about eleven years of age, living with her father, who is a labourer, on Garden Island, opposite to Kingston.

The defendant was a gentleman owning considerable property upon Garden Island, on which he had a garden, separated from a field of the defendant by an open paling. There were some gooseberry bushes

growing in the garden near the paling, and the plaintiff's daughter, with other little children, passing along a pathway which led over the field to a cottage on defendant's property, to which they were going (as they had been in the habit of doing) for milk, she picked a single gooseberry off the end of a branch which grew between the pales, and gave it to one of the younger children.

The defendant, observing this from his house, went out, seized, and thrust her into a root-house, on his premises, through a trap-door, which he fastened down, by placing a stone on it.

The child was frightened, screamed, and was let out by one of the defendant's servants, but was detained about his house for a couple of hours, until he sent down to her father and mother to come up. They would not come, and defendant at length sent her home, telling her that he would send a constable for her the next morning, to take her to Kingston to be punished; and did, accordingly, cause her to be taken, the next day, before a magistrate in Kingston, in the custody of a constable, when he charged her with stealing a quart of gooseberries, growing in his garden.

She was convicted of the offence, and fined 2s. 6d., or to be imprisoned twenty-four hours, if the fine should not be immediately paid.

*Henderson*, of Kingston, moved for a new trial, on the law and evidence, and for misdirection. He relied upon 1 Q. B. R. 66; 4 Price, 154; 5 T. R. 257; 5 M. & P. 125; 2 Bl. Rep. 22; 12 M. & W. 507; 1 M. & R. 275; 3 B. & C. 653; 1 B. & B. 432; 2 B. & Ad. 395; 6 Jurist, 757.

*Kenneth McKenzie*, of Kingston, showed cause. He relied upon 1 Campb. 151-9; 1 Str. 68.

ROBINSON, C. J. delivered the judgment of the court.—As regards the amount of damages and the merits generally, it is never without reluctance and hesitation that the court sets aside a verdict in any action of this nature, on the ground of excessive damages; because there is no rule approaching to certainty by which they can be estimated, and it is peculiarly within the province of the jury to assess them. In doing this, juries are supposed to give due consideration, not merely to the facts of the case, but to the feelings and motives of parties; weighing also, as they cannot fail to do in some degree, their characters and stations in life, out of which may very naturally and properly arise considerations leading them to deal with the case more or less indulgently according to what the substantial ends of justice may seem to require. A jury can more conveniently deal with considerations of this nature than the court can, and the constitution intends that they should entertain and dispose of them.

If the plaintiff, in any such case, receives at their hands a verdict of a shilling for what he may have felt to be an aggravating insult, and even a serious injury, he is in general compelled to abide by it—I might almost say invariably; for the exceptions, when a new trial has been granted on account of the smallness of damages (if any can be proved), are so extremely rare, that they prove the rule to be nearly inflexible.

It seems justly to follow, as a consequence, that when the plaintiff succeeds in obtaining substantial damages from a jury, the court should abstain from interposing to his prejudice. And the court does acknow-



ledge the principle to be binding upon them to a great extent ; for they do not, in fact, set aside verdicts in actions for torts of this nature, for excessive damages, without reluctance, nor except upon very clear and strong grounds.

Cases in which they have done so, however, are not wanting, though they are not very abundant. They are numerous enough to show that the court will not absolutely refuse to protect a party against ruinous injustice, where a verdict, manifestly outrageous in regard to amount of damages, has been given, under some improper bias or erroneous impression.

The power to grant such relief is, at least, too well established to be questioned ; and it is for the general interest of the community that the court should not too readily consult its own ease, by holding itself disabled from granting such relief ; for no man can tell how soon he may have occasion to rely upon the sound exercise of such a discretion, on the part of the court, to save him from the possible effects of passion or prejudice.

Primá facie, it is always to be assumed that a jury acts dispassionately, and from no unworthy motive ; but they are, in truth, more exposed than the court is to improper importunities. They are open to the influence of prevailing impressions, transient and mistaken as they often are ; and they may sometimes err even on the side of good morals and humanity, by carrying a laudable and amiable feeling to excess : for it requires cool reflection and a mind trained and disciplined to the various business of life, to be able to allow to principles of justice their due force, and to restrain an honest indignation within reasonable bounds.

Sometimes it may be shown, from extraneous circumstances, that the jury has been in fact influenced by some motive or feeling which ought not to have swayed them, or by some palpable misconception.

In other cases, there may be nothing to show this, except the utter disproportion between the cause of action and the verdict, which may be so great and so striking, as to afford of itself pregnant evidence that there has been something grossly wrong.

Instances might be put, but it is unnecessary.

It is objected that, without denying that the propriety of interposition in some such cases may be apparent, yet that those must be cases of verdicts outrageous in amount, and on that ground calling almost irresistibly for relief ; but that here the damages given are but 62*l.* 10*s.*, a very moderate sum, in fact, and such as cannot bear with any great hardship upon the defendant ; and that the court should therefore, in such a case, not interfere with the province of the jury, merely in order to save to him the difference between that sum and any other smaller sum which it might seem to the court more reasonable to have given.

On the other hand, cases were referred to in which a new trial had been granted for excessive damages, when the verdict was not larger in amount than the present. *Jones v. Sparrow*, 5 T. R. 257, was one of that kind, and is a strong authority upon the point ; because there the damages were only 40*l.* in an action for assault and battery, and the court set the verdict aside on the sole ground that the damages were excessive.



The circumstances, however, were very peculiar, and the court thought it incumbent upon them, in the exercise of a sound discretion, not to allow the verdict to stand. And if this were a case in which the plaintiff was so clearly in the wrong as the plaintiff was in that case, and the defendant so little to be blamed, we need not hesitate to rest upon such authority. But we think we cannot say that; and we think also that, supposing (which is still to be considered) that there is no legal objection to the verdict, it might be no advantage to the defendant to obtain a new trial, if he must take the chance (as of course he must) of another jury giving any much less sum, or of this court interposing a second time, on the ground of excessive damages, if they should give a verdict as large or even larger.

From the jury having given 62*l.* 10*s.* damages, which is rather a considerable sum, added to the costs of such a suit, I infer that they judged more severely of the defendant's conduct in this matter than I was disposed to do myself, after hearing all the evidence. If I could persuade myself that the defendant had suffered any disadvantage from my having pressed any point against him in my observations to the jury, more strongly than might now seem reasonable to my brothers or myself, I should be very unwilling that the verdict should stand. But the defendant has nothing to complain of on that head. On the contrary, I did entertain the impression at the trial that a graver notice had been taken of his conduct than was reasonable, and I certainly did feel it right to submit to the consideration of the jury all that I thought could in fairness be urged in extenuation of his proceeding. If they had been satisfied that his conduct admitted of being viewed in a light as favourable as I was inclined to think it might be, they would have been fully warranted, by the charge that was given to them, in finding a much lighter verdict.

The defendant, I had little doubt, had been a good deal annoyed by trespasses of this kind, committed by other persons, and was anxious to put an end to them. He saw the plaintiff's daughter picking something from a bush; and though he afterwards saw that it was but one gooseberry, which a child of three years old, to whom it was given, had yet in his hand when the defendant came up to them, he might very excusably resolve to try the effect of a little apparent severity, in deterring the children from repeating such conduct. I think he contemplated nothing more at the time than detaining the girl till her parents should come up, and, finding her in custody, should concur with him (as he might well suppose they would) in endeavouring to make a strong impression upon the girl's mind that she had done wrong, and that she must take no more such liberties.

The mother not only refused to come when sent for, but gave plain intimations that she considered the defendant had acted unwarrantably in making a prisoner of the girl, and that he would be held strictly responsible for it.

The defendant then, as I really believe, felt himself driven to measures which he would gladly have dispensed with, and under the impression that if he dropped the matter, it would be construed into an acknowledgment that he had acted, so far as he had done, without sufficient legal ground, he may have supposed that he had no safe

alternative but to make a matter of business of it, and persist in his charge, not for the purpose of punishing the child, but of showing that he was in earnest, that he was acting in good faith, and had really a valid ground of charge, if he chose to act strictly upon it.

The paying the fine himself, and having the child immediately discharged after the conviction, tend to show that he acted in that spirit.

On the other hand, the charge was an unreasonable one, both as regarded the law and the facts of the case. The three little children were going through the field, as they had done before, upon a lawful occasion, and without any design of plundering the defendant's garden. The evidence was express and positive that only one gooseberry was picked off the end of a limb that grew between the palings.

The child had not entered the garden, and did not steal *fruit "growing in it,"* which is what the statute makes an offence. She did no more than any grown-up person, the most respectable and intelligent, would have done without scruple, and without intending to commit a theft, or imagining that such a construction would be placed upon the act.

There was no going into the garden secretly or otherwise, in order to steal. The *animus furandi* was wanting. Scarcely any grown-up person is so strict in his morals as to hesitate to pick a cherry or a currant from a limb that projects from a garden. One may do it from mere idle curiosity, to try the fruit; another, because he chooses to eat it. It is a liberty to take with the owner's property, and may be construed into a trespass; but it was thoughtless, to say the least, to impute to so young a child, as a disgraceful act of stealing, what any of the defendant's best friends, I dare say, would not have hesitated to do, under similar circumstances.

Indeed one of the deponents, whose affidavits the defendant has produced in support of his rule, in order to establish that there could have been no limbs protruding through the fence, as the little girl swore, has no hesitation in declaring, on her oath, that she had herself frequently tried to reach the fruit, by putting her hand through the paling, but could not.

The defendant acted reasonably enough, so long as his object was only to deter the child from meddling again with the bushes, by showing her that he would not allow it; and when he found that the parents would not aid him in this, he should have dismissed her with threats: and if he had even given her moderate correction, perhaps a jury would have thought that not worthy of notice, if an action had been brought for it. But he acted injudiciously, in the course he pursued.

The putting the child in a dark root-house, alone, was imprudent; as it looked like undue severity, and it might have led to serious consequences.

If the arrest and detention, in the first instance, were with a view to proceedings under the statute, in which case alone it would have been legal, the defendant had only a right to take the party without delay before a justice, not to shut her up in a root-house.

Then, to prefer, on the next day, a deliberate charge for stealing in his garden a quart of gooseberries, there growing, when the child had

done nothing more than pick a single gooseberry off a bush growing out of the garden (for that was the proof given on the trial), was harsh and unreasonable in appearance, being both contrary to the law and the fact.

The statute enacts, if any person shall steal any fruit "*growing in any garden*," he shall be punished as it directs.

To some purposes, the fruit may be considered to be growing where the root is growing, but not, I think, in cases under this criminal statute, and for obvious reasons; for otherwise, it would be no offence against the same clause to steal grapes growing in a hot-house, when the roots are outside, as they usually are.

The object was to protect the precincts of the garden from such depredations.

It would have been far better for the defendant not to have so strained the law; for by doing so, he has laid himself open to consequences from which we cannot protect him by insisting upon holding the jury precisely within our notions of the compensation which it may be just to make for such an injury.

This action, however, it is to be considered, is not by the person who suffered the alleged wrongful imprisonment, but by her father, who can undoubtedly sustain the action, on the ground of loss of service, though it may be more imaginary than real; and it is contended that, by analogy with other actions by a parent, the aggravation of keeping the daughter in confinement, on a disgraceful charge of theft, may be considered by the jury in the estimation of damages; though, from what appeared at the trial in regard to the father's general character, I apprehend that his claim to sympathy on account of mortified feelings was not a very clear one.

On the whole, after carefully considering the case, we do not think that, under the circumstances, and giving due weight to the nature of the action, we can properly set aside the verdict on the ground of excessive damages. It would be contrary to the course usually taken in such cases to do so.

But it is objected that there was a misdirection in point of law; and if such an objection were found to be well supported, we should feel no unwillingness to grant a new trial.

The defendant, at the trial, produced the conviction of Bridget McDonald, and maintained that it was conclusive evidence, not merely that she had been found guilty, but that she was in truth guilty of stealing fruit growing in the plaintiff's garden.

On the other hand, the plaintiff contended that, so far from being conclusive evidence, it was not admissible at all; because it was *res inter alios acta*, and because it was founded on the evidence of the defendant himself, and was therefore no evidence in his own favour. I received it as evidence sufficient, if unopposed, to establish the guilt of the party, but capable of being controverted. I was not satisfied that the conviction could properly be received in evidence, but thought it better to admit it for the time, subject of course to the exception.

One of the justices who made the conviction swore that it was founded upon the girl's own statement, rather than upon the evidence of the defendant Cameron; and this induced me the more readily to



receive it. But it soon after occurred to me, on reflection, that there could be no stress properly laid upon that consideration; for there is no doubt, that what the justices reckoned upon as the girl's *confession*, was nothing more than her relation of the facts, such as she gave at the trial. She did not confess herself guilty of theft, unless her conduct amounted to that. That she did commit theft, was the legal inference of the magistrates; but she did not acknowledge it, but protested that she was innocent of any such intention.

But whether the conviction should have been received at all, is not now the question. The defendant's complaint is, that it was not held to be conclusive evidence of the alleged theft, and on that ground entitling him to a verdict under the general issue. All authority appears to be against this position.

Convictions or judgments after verdicts, when the proceeding is *in rem*, as for the condemnation of goods forfeited, are held to be conclusive; but not when the proceeding is *in personam*.

The general issue here, in effect, puts in issue, not the fact whether Bridget McDonald was on a certain day convicted of a certain act of theft—in which case undoubtedly the records of conviction would be conclusive that she was so convicted,—but whether in fact she was *found by the defendant stealing fruit in his garden, at the time when he arrested her*.

If that were the fact, then the defendant could lawfully take her in custody, under the 34th and 55th clauses of 4 & 5 Vic. ch. 25.

Upon any other ground, he does not pretend that he had any justification for the arrest.

Now that is a point upon which the record of the conviction affords no evidence. For all that appears there, she might have been committing no offence whatever, at the moment when the defendant apprehended her. We must look at the evidence of the facts obtained *aliunde*; and supposing these had shown that the defendant arrested her when she was a mile distant from his garden, the fact that she had been convicted of stealing in his garden on that day, would not have made the arrest lawful. We must therefore receive evidence of the facts under which she was arrested; because, in regard to these, the conviction is silent; or if it did recite them, it would not be evidence of them; since the circumstances of the arrest are collateral matter, which the justices were not called upon to find. But independently of this difficulty, the conviction is not conclusive evidence, if evidence at all, to prove the fact of guilt, in a civil action, brought by one who was no party to the criminal proceeding. It is *res inter alios acta*.

Mr. Phillips, in his work on evidence, treats this as a principle well settled (page 520). It would protect the justice or the constable who acted under it, but not the party on whose evidence it was obtained, and at whose instance the prosecution was instituted.

When a party has prosecuted another criminally, for an assault, and afterwards brings an action for the same assault, he cannot rest on the conviction, even when it was upon a verdict, as evidence to prove the assault in the civil action, which is a case stronger than the present; for there the defendant is the same person in both proceedings.—*Sampson v. Tothil*, 1 Str. 68.

In *Rex v. The Warden of the Fleet*, 12 Mod. 337, it was expressly adjudged by the court, that the conviction of a prisoner by indictment for an escape, would be no evidence for the warden, in an action brought against him by the prisoner for false imprisonment in taking and detaining him; which is, in effect, precisely this case. The case of *Smith v. Rummens*, 1 Campbell, 9, is also precisely in point, and is recognised as good law.

When one is driven to consider the possible effect of this rule of evidence, if enforced to its fullest extent, its reasonableness would seem to open a wide field for discussion; but it is sufficient to say, referring to authority merely, that we cannot hold otherwise than that, however a conviction by a court of competent jurisdiction may in some cases be admissible evidence, and even conclusive as to matters coming collaterally in question; yet that where the issue is directly raised, in a civil action, whether A. B., who is no party to the suit, committed a certain offence or not, the record of his conviction by a criminal court is not conclusive evidence of that fact; that the weight of authority is against its being even received in evidence, where the conviction was obtained partly upon the evidence of the party producing it in the civil action, and where it rested wholly on his evidence, it can undoubtedly not be received.

For these reasons, we are of opinion, that the conviction in this case could certainly not be held to be conclusive; and that we cannot on any ground make the rule absolute.

*Per Cur.*—Rule discharged.

---

DOE DEM. BRENNAN V. O'NEILL.

The provisions of the Registry Act are as much applicable to sheriffs' deeds, given to purchasers at sheriff's sale, as to any other description of conveyance.

The production of the book of registry, in which a memorial of a deed affecting the title to a certain lot of land is recorded, is good evidence of the title to such lot being a registered title.

Ejectment for lot 9, in the 1st concession, Westminster.—The plaintiff claimed under a sheriffs' deed, made to him on 20th June, 1846, upon a sale on an execution against the lands of the defendant's brother, John O'Neill.

The defendant claimed under a deed made to him on 3rd February, 1842.

The title to this lot had become a registered title, by the registry of the conveyance to John O'Neill, before either of these deeds was given.

The deed to the defendant, under which he claimed, had never been registered.

The plaintiff maintained that, on this ground alone, he was entitled to a verdict, under the 2nd clause of the Registry Act; and besides, impeached the deed from John O'Neill to his brother, the defendant, as being fraudulent, and made to defeat creditors—a secret, voluntary conveyance.

This was left to the jury by the learned judge, as a question for them to determine; and the legal ground that at any rate the defendant's deed must be postponed to the plaintiff's, on account of its not having



been registered, was reserved for consideration in bank; there having been an objection made to the sufficiency of proof to show the title to have been a registered title, when the defendant received his deed.

The registrar swore that there was in the office a registration of a deed, on the 17th day of April, 1837, to John O'Neill, of this lot; and he had at hand the book of registration, in which the memorial was recorded. But it was objected, that the only legal evidence for the purpose was the production of the deed, with the certificate of registration endorsed.

*John Wilson*, of London, moved, on the leave reserved, to enter a verdict for the plaintiff, or for a new trial on the merits.

*J. Duggan* showed cause.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the rule must be made absolute for entering a verdict for the plaintiff, on the point reserved.

There is no doubt that the provision of the Registry Act must have effect, which postpones unregistered deeds, or rather declares that they shall be treated as fraudulent and void, as against subsequent purchasers for valuable consideration, who shall have registered their deeds.

The question is, whether it clearly applies on these facts.

We are of opinion, that the evidence which was offered of the title being a registered title before the deed to the defendant was made, was perfectly good evidence.

Though the certificate endorsed on the deed is made evidence of the fact of registry, it is not made the only evidence of it, nor the best. There can surely be no stronger proof of the title to a particular lot of land being a registered title, than the production of the book of registry, in which a memorial of a deed affecting it is in fact recorded, and in which intending purchasers are to make their searches.

There can be as little question, that a sheriff's deed to a purchaser is such a conveyance as will take precedence, by reason of being registered, over a prior unregistered deed; otherwise, there would be no inducement to register sheriff's deeds, and no chain of title traced in the register could be depended upon.

The mortgage which the defendant, John O'Neill, gave, after the *fi. fa.* against his lands had been placed in the sheriff's hands, can of course not prejudice the title of the purchaser at sheriff's sale; for the land was bound by the execution.

His having given such a mortgage on the land (as if it were still his), after he had made the deed by which he professed to convey the land to the defendant, is strong evidence that that deed which he retained in his own possession was a mere pretended transfer. But it is unnecessary to go into that question; for we are of opinion that the plaintiff is entitled to a verdict on the other ground.

*Per Cur.*—Rule absolute.

---

CAMPBELL V. CUSHMAN.

A., living abroad, sends to an agent in this province to purchase a lot of land for the use of B., who was living in the province, and to take the conveyance to himself (A.). This is done, and B. is put into possession of the land, who

from thenceforth uses and cultivates it for his own benefit. At the time of the purchase, a crop of wheat was on the ground: Held, that B., and not A., should sue in trespass for cutting and carrying away the wheat.  
Quære.—Did the property in the wheat belong to A. or B.?

Trespass for taking twenty loads, or 6,000 sheaves of wheat, of the plaintiff.

Pleas.—1st, Not guilty.

2nd, That the wheat was not the property of the plaintiff.

3rd, Leave and license from the plaintiff.

4th, A special plea, which was demurred to.

Issue had been joined in Easter Term last; and the entry of the venire on the Nisi Prius record was improperly made returnable on the last day of Hilary Term, instead of Trinity, and the jurata was made for the first day of Trinity Term, instead of Michaelmas, which was the issuable term after the assizes.

The defendant's counsel objected to the power of the judge to allow of an amendment in these respects; but it was permitted.

The plaintiff resided in Scotland, and employed one Patterson as his agent, to purchase a lot of land for him in this province, intending it for the use and occupation of his brother, John Campbell, who is in this country. Mr. Patterson accordingly bought fifty acres, in Trafalgar, of the defendant Cushman, and took from him a deed of bargain and sale, on 11 March, 1844, in the common form, conveying the land to William Campbell, the plaintiff.

There was some wheat then in the ground, which Cushman, as he asserted, wished to reserve; and parole evidence was given that before the deed was executed, it was agreed that the crop should be reserved to Cushman; and that after the deed was executed, and even after the trespass complained of, Patterson had admitted that it had been so agreed between them.

This, however, was denied by Patterson; and the evidence on that point was contradictory.

The defendant, insisting upon his alleged reservation of the crop, entered the field, which was ready for harvesting, and cut and carried away the wheat; which was the trespass complained of.

It was objected, on the part of the plaintiff, that no evidence to show an agreement by parole, inconsistent with the legal effect of the deed from Cushman to the plaintiff, ought to be received; but the learned judge admitted it, under the impression that it might sustain the plea of license.

The defendant, on his part, before going into his case, contended that he was entitled to a non-suit, on the ground that the plaintiff, William Campbell, was not entitled to sue for the trespass, even if the defendant had acted wrongfully; for that the brother, John Campbell, being the beneficial occupant of the land, and that by the plaintiff's permission, was the only person who could bring trespass for the injury.

The learned judge allowed the case to proceed, reserving leave to move for a nonsuit on that ground; and at the conclusion of the evidence, he left it to the jury to find for the defendant on the plea of license or not, according as they were satisfied that Patterson had or had not granted permission to the defendant to take the crop.

With regard to the property in the wheat, he considered that the deed conveying the land must govern, in the absence of any written evidence of an agreement that the defendant should have the crop.

The jury found a verdict for the plaintiff, and 25*l.* damages.

*J. Duggan* moved for a nonsuit, on leave reserved, or for a new trial on the law and evidence, and for misdirection and the admission of improper evidence. He relied upon 1 T. R. 9 ; 4 T. R. 489 ; 1 Ch.'s Plead. 72, as giving him a right to a nonsuit on the leave reserved.

*W. H. Blake* shewed cause.

*ROBINSON, C. J.* delivered the judgment of the court.

We must infer, from the verdict of the jury, in connection with the learned judge's charge, that the jury were not satisfied that the defendant had reserved to himself the right to the growing crop ; and although there was evidence certainly, and not a little, to prove the contrary, yet we should not be inclined, taking the evidence altogether as it stands, on that point, to grant a new trial upon that question of fact.

It is the duty of parties to take ordinary care to preserve evidence of what has been agreed upon between them on such occasions, and not to throw it upon juries to conjecture, upon inconclusive and conflicting testimony, what the understanding really was. A few words in writing would have made all plain ; and parties must use common care to protect their interest. Contracts of this special kind should be put in writing ; or if parties omit this, they must take the chance of what witnesses may recollect, or think they recollect, and of the conclusions that juries may come to, upon unsatisfactory evidence. The amount of the verdict is not so large as to induce us to interfere, except upon some very clear ground.

Upon the point on which the nonsuit was moved, I take the amount of the evidence to be, that the plaintiff, living in Scotland, sent out to an agent here to purchase a lot of land for the use of his brother, who was in the country, taking the conveyance to himself, the plaintiff ; that this was done, and his brother put in possession of the land, who thenceforth used and cultivated it as his own, there being, at the time of the purchase, a crop of wheat in the ground. The question is, who can maintain trespass for cutting and taking away that wheat some months afterwards, and while the plaintiff's brother was so in possession exclusively, and for his own benefit.

I am of opinion that the person beneficially enjoying the land, for his own exclusive use, as the occupant, could alone bring trespass for the act of cutting and carrying away the wheat.

The question is not simply as to the property in the wheat. If it were, I am not prepared to express the opinion that the wheat was the plaintiff's. But for the alleged trespass of the defendant, in taking it away, it would no doubt have been harvested by John Campbell, in which case as I do not suppose from the evidence that the plaintiff was likely to have claimed it, so I do not imagine that he could have been regarded as being the legal owner of it, while it lay in his brother's barn ; but that is not now the question. That he could not have maintained trespass against his brother for cutting it and carrying it from the ground, I take to be perfectly clear ; and if he could not, it would be by reason of



his brother's beneficial occupation of the land on which it grew, by the plaintiff's own permission, and from the care and charge which he consequently had of the growing crop, and the greater or less degree in which his labour must necessarily have been mixed up with it, in keeping it enclosed and guarding it from injury. It could not be from the incorporation of his labour with it in the mere act of harvesting, because that would have been the very act complained of as the trespass; and if that were any reason at all, it would apply equally to the case of this defendant.

*Per Cur.*—Rule absolute for nonsuit

### L'ESPERANCE V. CLARK.

A. leaves with B. the following receipt:—"Mr. John L'Esperance has left with me a note, signed by J. G. Tremain, for 97*l.*, payable at the Bank of Montreal, here, at three months from the 31st ultimo, which I am to account to him for, *if paid*, deducting the amount he owes me.—Cobourg, 1 April, 1846.—(Signed) Benjamin Clark."—A. endorses the note, and gets it discounted at a bank. When it becomes due, the note is renewed with B.'s assent, who endorses the same. Before the renewal becomes due, B. sues A. for money had and received. Held: That under these facts, the action would not lie.

The plaintiff declared in assumpsit for money had and received, and on an account stated.

Pleas.—First, Non-assumpsit.

Second, Set off.

Replication.—Similiter to first plea.

To second plea, That plaintiff was not nor is he indebted in manner and form, &c.

At the trial, a receipt was produced, signed by the defendant, in the following words:—"Mr. John L'Esperance has left with me a note, signed by J. G. Tremain, for 97*l.*, payable at the Bank of Montreal, here, at three months from the 31st ultimo, which I am to account to him for, *if paid*, deducting the amount he owes me.

"Cobourg, 1 April, 1846.

(Signed) Benjamin Clark."

And a note was produced, signed by J. G. Tremain, as maker, drawn in favour of the plaintiff, and endorsed by plaintiff, W. Tremain, and defendant, in the same order. It was proved to have been discounted at the Commercial Bank, on account of defendant, who received the proceeds. When it became due, it was retired by an instalment and a renewal note for 80*l.*, with the same names upon it. Renewal note was paid since the action was brought.

The defendant's counsel moved for a nonsuit, on the ground that the action should have been special, and that plaintiff should have declared upon the receipt as an agreement.

Objection overruled.

Evidence for defence of set-off.

Balance of 17*l.* 12*s.* 9*d.* proved upon a note drawn by plaintiff, in favour of defendant; and a note of 25*l.*, drawn by Lambert, and endorsed by plaintiff, the signatures to which were also proved, but there was no evidence of notice of non-payment.

Winckworth Tremain renewed the note for 97*l.* for his brother. He saw the plaintiff, and told him that Mr. Robins (cashier Com. Bank) had agreed to take 17*l.* and a renewal for 80*l.*, which he assented to. The renewal was sent to Peterborough, for his brother's signature, as maker, and plaintiff's, as endorser. It was then sent by him (W. T.) to defendant, and he put his name upon it; and then it was renewed by Mr. Robins for the *accommodation of his brother*.

The jury gave a verdict for plaintiff, for 81*l.* 7*s.* 11*d.*, subject to the opinion of the court on the following points:—Whether the defendant can be regarded as having received the money to the plaintiff's use, before the amount of the 80*l.* was paid, on 12th October.

Counsel for plaintiff objected, that the extension of the time by the renewal of the note, if it amounts to anything, should have been specially pleaded.

The learned judge did not think so. The question is, was the money received at the time the note was discounted, and could the plaintiff have then sued for it? If he could, did the subsequent transaction extend the time, and render it necessary for the defendant to plead that fact?

The counsel for defendant also contended, that if defendant could be regarded as having received the money, he was not liable *without a demand*.

The Hon. *R. B. Sullivan*, for the plaintiff, admitted that Clark had endorsed the note to obtain the discount; but contended, that by putting it out of his hands and beyond the plaintiff's reach, and making him liable to the bank, he ought to account to him for it. He referred to the case of 4 A. and E. 819; and contended that that case was distinguishable from this, because there the plaintiff had not been made liable to a stranger by the transfer.—2 M. & W. 282; 6 Taunt. 110. The taking another note for it (the renewal) was but a payment.

*Cameron*, Sol. Gen., with whom was *Cockburn*, of Cobourg, for the defendant.

When this action was brought, the note had not been paid by any one. It had been renewed, when due; and the plaintiff's joining in the renewal shewed that he was assenting to the note still being kept afloat for the benefit of the maker. The note was, in effect, still running, and had never been paid, so as to make the defendant liable on his receipt.—2 Cr. & J. 320; 4 A. & E. 819; 1 Taunt. 572; 3 B. & C. 626.

*Sullivan* in reply.—The defendant has received the money on the note, and therefore is accountable. The plaintiff was obliged to sign the renewal, otherwise he would have been made to pay the whole.—6 Taunt. 110. He contended that the defendant was estopped from saying he had not received the money.

ROBINSON, C. J. delivered the judgment of the court.

The court is of opinion, that upon the case stated, the plaintiff could not maintain this action as for money had and received to his use, when the defendant had no otherwise received the money, than by discounting the note at the bank, which was, in effect, receiving from a third party an advance of the money upon the security of the note, and in the expectation that it *would be paid*. That was not a *payment* of the note by the maker or prior endorser, such as made the defendant accountable to the plaintiff under his receipt.

He had, by endorsing the note to the bank, in order to obtain the advance, rendered himself liable as an additional party. The note had not been paid by any one, when this action was brought, and there was no certainty that the defendant might not have to pay the note himself to the holder, when it should come to maturity.

The case of *Wilkinson v. Clay*, 6 Taunton, 110, cited for the plaintiff, is not applicable; because there the defendant had, in effect, received the money from the plaintiff's debtor, by taking it into account with him, and had taken his acceptance for the general balance due on their mutual accounts, after the sum in question had been charged to him, thereby postponing the payment.

Here, the defendant had received nothing, directly or indirectly, from the maker of the note, as the plaintiff well knew; for the plaintiff concurred in creating the renewal note, expressly for the accommodation of the maker of the note, and that he might still have further time to pay. The effect of allowing the plaintiff to recover, under such circumstances, might be to make this defendant pay the note first to the plaintiff, and afterwards to the bank, while the maker of the note had paid it to no one.

The case cited for the defendant, of *Atkins et al. v. Owen*, 4 Ad. & Ell. 819, is decisive against this action, if any authority were wanting. It was attempted to distinguish that case from the present; but it appears to me, that in its circumstances, it was more favorable for the plaintiffs.

*Per Cur.*—Postea to the defendant.

#### DOE DEM. MATLOCK v. DISHER.

A., the grantee of the crown, conveys to B. B. conveys to C. The conveyance from B. to C. is registered in the Niagara District, before the war of 1812. The record of registration is burnt during the war. C.'s deed is not re-registered, according to the provisions of the 56 Geo. 3, ch. 16. C., after the war, conveys to D., who does not register his deed. C. conveys again to E., without consideration, who registers. E. conveys to F., for a valuable consideration, who also registers.

*Held:* That C.'s not having re-registered his title, in compliance with the provisions of the statute 56 Geo. 3, ch. 16, had not the effect of securing the title to D., by making C.'s title an *unregistered title* at the time of his conveyance to E.

*Held also:* That F. having given a valuable consideration for his deed to E., the fact that E. had given no value for his deed to C. would not defeat the operation of the Registry Act, 35 Geo. 3., ch. 5, in favour of F.'s registered title, as against D.'s prior unregistered one.

Ejectment for lot 13, in 2nd concession of Pelham.

The crown granted this land, in 1798, to one O'Carr, who conveyed to Caleb Matlock, father of the lessor of the plaintiff, in 1807, by a deed which was registered (as appears by a certificate endorsed on it) 13th December, 1808.

In March, 1824, Caleb Matlock made a deed of the land to the lessor of the plaintiff, which was not produced at the trial; but it was proved that it had been left with one Jones (who drew it), for the purpose of being recorded; and that before it was recorded, the father, who had made the deed, came to Jones with a false message (as it is stated),

that the lessor of the plaintiff had sent him for it, and he got it up and destroyed it.

This deed was never registered.

It was stated by Jones to have been given in consideration of a debt due to the lessor of the plaintiff by his father, and upon the further consideration that the lessor of the plaintiff, who then lived on Grand Island, would support his father and mother during their lives; for which purpose he gave his bond to the father.

On the 27th December, 1824, Benjamin Matlock having in the meantime gone into possession of the land, Caleb Matlock made a deed of it to his son Caleb, with whom he was then living; and this deed was registered, and is the first deed that now appears in the county registry, by reason of the destruction of the office books and papers by fire, during the war with the United States of America, in 1812.

Under this deed, the defendant makes title through conveyances duly registered; the first being from Caleb Matlock, junior, to one Nellis, who sold and conveyed to this defendant.

When Caleb Matlock made the deed to his son Caleb, one Dandy was in possession, under a lease for five years, which the father had given him.

For all that appeared, there was no pecuniary or other consideration given by Caleb to his father for the land.

As to the merits of the case, as between the two brothers, Benjamin and Caleb, it was uncertain from the evidence on which side they were.

The lessor of the plaintiff contended, that his brother Caleb dishonestly practiced upon his father, when he was childish and imbecile from age, and got a deed from him, to defeat the previous deed to the lessor of the plaintiff, which, he maintains was made upon good consideration; that he had made use of the old man, to get the deed out of the hands of the agent of the lessor of the plaintiff, under a false pretence; and that Caleb, the son, had given no consideration whatever for the land.

On the part of the defendant, it was contended that the conveyance to Benjamin was made wholly upon an understanding that he was to support his father; and that the old man, soon after, came to live with Caleb, complaining that the bad treatment he had received from the lessor of the plaintiff made it impossible for him to remain with him; and that he did, in consequence, of his own free will, make a deed of the land to his son Caleb.

The jury found for the defendant.

Miller, of Niagara, moved for a new trial, on the law and evidence, and for misdirection and the rejection of proper evidence.

Eccles shewed cause.

The argument is fully stated in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the Court.

So far as regards the merits, I think we are not called upon to interfere; for it is too uncertain on which side the justice of the case really is. There is no evidence, free from suspicion, of any valuable consideration being paid by one brother, more than by the other; and the defendant being a purchaser for valuable consideration, from another, who in like manner purchased *bonâ fide* and for good consideration, it is clear



that he is not to be prejudiced by the mere circumstance that the deed to Caleb Matlock, from his father, was a voluntary conveyance.

But the following legal questions are raised, from which I suppose the jury are understood to have found their verdict for the defendant, on the ground that the deed to Caleb Matlock, jun., being registered, must prevail over that to the lessor of the plaintiff, which never has been registered ; the title being, previous to either conveyance, a registered title.

1st, Can the title to this lot be treated as a registered title in 1824, when the two conveyances were made upon which the opposing claims rest ; the fact being, that the deed to Caleb Matlock, sen., from the grantee of the crown, does not now appear in the office as a registered title, and did not, when those deeds were given. All that is known of it is, that there is a certificate of registry endorsed on the deed ; no proof being given of any proceeding taking place under the statute 56 Geo. 3. ch. 16, for the purpose of restoring the registration of the deed, all trace of which, it may be supposed, was lost when the office was burnt, during the war.

2nd, That, at any rate, the second deed cannot prevail, under the Registry Act, over a prior deed, not being given to a purchaser for a valuable consideration, but being a mere voluntary deed.

The facts of this case, while they were much more recent, have undergone full discussion in this court, in an ejectment brought by Nellis to gain possession after his purchase ; and it was then determined that the deed to Caleb Matlock, jun., being duly registered, was entitled to prevail over the prior deed, unregistered, which had been given to Benjamin Matlock.

I have looked at my note of that case, and find that the facts were proved very fully upon the trial ; and the considerations which they seemed to involve were brought under the view of this court, and a decision given upon them, except in regard to the effect of the statute 56 Geo. 3, ch. 16, which was not then relied upon as creating any difficulty in the way of Nellis, who claimed under the late conveyance.

The court held then that, admitting that Matlock the father had combined with his son Caleb to get the deed which had been given to Benjamin out of the hands of his agent, by a dishonest trick, in order to prevent its being recorded, yet that we could not, on that account, deny to the express provision of the Registry Act its proper legal effect.

The fact still remained, that the father, being of sound intellect, and well able to judge and act for himself, had chosen, whether justly or not (perhaps we might say, not unjustly, if we knew all the circumstances), to deprive Benjamin of the estate which he had intended to give him, upon the condition of being maintained by him ; and to make a similar arrangement with his younger son.

The deed had been long enough in Benjamin Matlock's possession, or his agent's, to be registered ; and the material fact in a court of law is, that it was unregistered up to the time of its destruction.

Not seeing the deed, and having no particular account of its contents, we cannot say that it was such a deed as would pass the legal estate without the aid of registration, to supply the place of enrolment ; but the clear ground is, that being unregistered, the later conveyance of the

estate, made by the same grantor, being registered, must prevail; and the unregistered deed must be held fraudulent and void, not as against Caleb Matlock the younger, if he were the defendant, and if the jury had found him to be claiming under a merely voluntary deed, but against Nellis or Disher, whose title to be regarded as purchaser *bonâ fide* and for valuable consideration does not seem to be denied.

It was not shewn whether either Nellis or Disher had notice, at the time of his purchase, of the unregistered conveyance; but notice could make no difference in a court of law.

This was the view taken of the state of the title, when the facts were last before the court; and we take the same view now.

But the case is presented in a new aspect, by the question which has been raised now, for the first time, upon the effect of the statute 56 Geo. III. ch. 16.

The whole object of that statute was to compel persons holding lands in the district of Niagara, under conveyances which had been registered, and of which the entries made in the books of the county register had been destroyed by the casualty recited in the act, to take the steps pointed out by it for restoring the registration.

It is the 6th clause alone which it is material to refer to.

We think the certificate of registration, endorsed on the deed from O'Carr to Caleb Matlock, establishes the fact that that was a registered title. Then, if it had been proved (which it was not) that the record of registration of that deed had been destroyed, the provisions of the statute 56 Geo. III. ch. 16, would have applied.

I have had some doubt whether the statute would extend to the case of a deed which, like that from O'Carr, being the first conveyance after the patent, did not require registration in order to protect the title of the grantee against any subsequent conveyance; but the words of the 6th clause are very general, and we must, I think, regard them as extending to such a case. So that, if it had been proved that the registration of O'Carr's deed had been destroyed, and if O'Carr, or his heir, had made a second deed to some other party, who had registered it, then I do not see how we could say that the clause of the statute did not make the first deed void, though we can hardly suppose that the legislature meant to do more than compel parties in the district of Niagara to re-register deeds which they would have been compelled by the Registry Act to register, in order to their security, and subject to the same peril, if they should omit it—that is, to the peril of being cut out by the registration of a subsequent conveyance.

Take the act either way, however, it affords no ground for holding that the effect of not taking steps to restore the registry, is to place the deed that had actually been registered in the situation of an unregistered deed, in any other sense than that the holder of the title under it would incur the risk of having his title defeated, by the same grantor or his heir giving another deed.

What the plaintiff's counsel contends for is, that in consequence of the omission to restore the registry, in the manner pointed out by the 56 Geo. III. ch. 16, we must now look upon the title to this lot as having been an unregistered title at the time that Benjamin Matlock took his deed; that he was, consequently, not called upon to register

that deed; and that the provisions of the Registry Act, 35 Geo. III., do not extend to him, although the deed from O'Carr to Matlock, sen., was in fact registered, as is shown by the certificate endorsed on it, although no proof whatever was given that the registry of that particular lot had been lost or destroyed, and although this absurd consequence would follow (if such an effect were given to the statute), that Benjamin Matlock, the heir of his father, would place himself in a better situation by omitting to comply with the statute, than by observing its provisions; for if either he or his father, under whom he claims, had, at any time between 1816 and December, 1824, or indeed till the deed to Nellis was made—being the first made to a purchaser for valuable consideration,—restored the registration of O'Carr's deed, under the statute, then there could have been no doubt raised as to its being a registered title, when the later deed came to be given, which, by reason of its registration, would be entitled to be preferred.

In the former ejectment, when the present lessor of the plaintiff attempted unsuccessfully to resist Nellis's title, some stress was laid in the argument, in banc, upon the fact of the deed being made to Caleb Matlock, jun. by his father, at a time when, as it was alleged, there was another person in possession claiming adversely, that is, not claiming to hold under or for him, though from him.

The court did not, however, give way to the objection, remarking, that no such ground had been taken at the trial, and that the evidence respecting the actual possession at that point of time was not clear and conclusive.

The same legal objection to the validity of Mr. Matlock's second deed was taken upon the argument of this rule for a new trial. The point, however, does not seem to have been raised at *Nisi Prius*. If it were fairly open, the evidence on the point is not clear and consistent; and supposing it to have been fully proved, that when Matlock the father made his deed to his son Caleb, this lessee of the plaintiff was in actual possession, claiming to hold the land under the deed which had been made to him, still I think it plain, that that fact would not make the second deed void, as being contrary to the statute Hen. VIII. ch. 9, or void at common law, on the ground that the grantor, being disseised, could not convey.

That point was considered in this court, in the case of *Meyers qui tam v. Reynolds*.

We are of opinion, that the rule to set aside the verdict must be discharged.

*Per Cur.*—Rule discharged.

---

FOWLER v. HOOKER ET AL.

Construction of contract entered into between the consignor and forwarder of goods, as to the discretion the forwarder may use, in the time, mode, and place of shipping and forwarding the goods.

It is no defence to a forwarder, deviating from his instructions, that after the deviation, he told the plaintiff's agent he had done so, and no objection was made by the agent. *Aliter*, if he had told the agent of his intention before the deviation, and could show that the agent had any discretion in the matter.

The declaration stated, that heretofore, to wit, on the 3rd of November, 1845, in consideration that the plaintiff, at the defendant's request,



had consigned and caused to be delivered to the said defendants, at Kingston, Midland District, certain goods, addressed and directed to the plaintiff, at Chatham, Western District, the said defendants to use their best endeavours to get the said goods forwarded from Kingston aforesaid to Chatham aforesaid, and if the defendants should think it too late to send the same up the *Lake* (meaning Lake Erie), then to forward them to *Toronto*, but if the defendants should send them to *Amherstburg*, *Windsor*, or *Chatham*, then the defendants to insure the same, the said several matters to be done for certain reasonable reward to the defendants, &c.,—in *consideration* of which said premises, the defendants promised to use their best *endeavours and judgment to get the said goods forwarded*; and if they should think it too late to send them up the *Lake* (meaning Lake Erie), then to *forward them to Toronto*; but if they should send the same to *Amherstburg*, *Windsor*, or *Chatham*, then to *insure them*. And the said plaintiff saith, that although the defendants received the said goods for the purposes aforesaid, they, not regarding their said promises, did not either send or forward the said goods to *Amherstburg*, *Windsor*, or *Chatham*; or by way of Lake Erie, or to *Toronto* aforesaid; but, *è contra*, afterwards, to wit, on the said 3rd of November, 1845, at Kingston aforesaid, shipped and forwarded the same on board a schooner called *The Kent*, about to sail from Kingston to Hamilton, in Gore District; which said vessel with said goods proceeded on the voyage from Kingston to Hamilton, and with the said goods was wholly lost by the perils of the navigation, whereby the said goods were wholly lost to plaintiff.

Pleas.—1st, Non assumpsit.

2nd Plea, That after delivery to them of the said goods, the defendants did *use their best endeavours and judgment to get the same forwarded from Kingston to Chatham; and in pursuance thereof, afterwards, to wit, on the said 3rd of November, at Kingston aforesaid, shipped and forwarded the same on board a schooner or vessel called The Kent*, then about to sail from Kingston to Hamilton aforesaid, such vessel being then in good order, well manned and found, &c., and being so, &c., proceeded with said goods on the said voyage from Kingston to Hamilton aforesaid, and with the said goods on board as aforesaid, whilst proceeding on the said voyage, and before arriving at Hamilton aforesaid, to wit, on the 5th November, in the year aforesaid, by perils of the navigation, &c., was lost, whereby the said goods became and were lost.—Verification.

General Demurrer.

3rd Plea, That the said goods were delivered to the defendants by one Steers, then agent of the plaintiff, to wit, on the 3rd of November aforesaid, at Kingston aforesaid, to be carried and delivered to plaintiff, at Chatham aforesaid, for reward; and said Steers then requested the defendants to use their best endeavours and judgment in the carriage and forwarding thereof to the plaintiff, and requested the defendants, if they should think it too late in the season of navigation to send them up the Lake (meaning Lake Erie) to Chatham aforesaid, that they should forward them to Toronto; and if they should send them to Chatham, Windsor, or Amherstburg, the defendants were to insure them. And the defendants say, that when the said goods came to

hand to be forwarded as aforesaid, they considered it too late to send them up by way of Lake Erie to Chatham aforesaid; and that they, exercising their best endeavours and judgment in forwarding them, afterwards, to wit, on the 3rd of November, 1845, shipped the same, consigned to plaintiff, on board of a schooner or vessel called *The Kent*, then about to sail from Kingston aforesaid to the port of Hamilton aforesaid, which schooner *shortly afterwards* sailed upon the said voyage to Hamilton, being at that time in good order, &c. And defendants say, that *shortly after sailing*, to wit, the 5th November, 1845, said *Steers*, then being such agent of the plaintiff as aforesaid, was informed by the defendants thereof; and that *he, then being such agent as aforesaid*, then consented and agreed thereto, and approved thereof. And the defendants say, that *afterwards*, and while the said vessel was proceeding on the said voyage, and before arriving at Hamilton, to wit, on the 6th of November aforesaid, was by the perils of the navigation lost, whereby the said goods became lost.—Verification.

Demurrer upon the following special causes:

1st, That the said plea admitted a breach, and set up a parol discharge, without showing any authority in *Steers* to release or acquit them.

2nd, That it was not shown that *Steers* had authority to consent, agree to, or approve of the alleged mode of forwarding.

3rd, Or that he so consented, &c., on *behalf* of the plaintiff.

4th, That it was not averred that the said vessel had not been *then* lost, or that *Steers* or defendants had no notice thereof.

5th, That it was not shown whether the said goods were insured or not.

*Draper*, Attorney-General, and *Thomas Galt* for the demurrer.

The 2nd and 3rd pleas are clearly bad. The contract, as admitted and set out by both parties, shews that the goods were to be forwarded to Chatham, by way of Lake Erie, if the navigation permitted; otherwise, they were to be sent for the winter to Toronto. The defendants did neither the one nor the other, but forwarded the goods to Hamilton, with what purpose or intention does not appear. There is no averment that Hamilton is on the way to Chatham, or to the other places named, or that the goods were necessarily sent there in order to reach their destination. The court might infer—at least, that inference is as much open to them as any other—that the defendants intended to leave the goods in Hamilton for the winter, or to send them by land from thence to Chatham. But the contract certainly gives the defendants no power to exercise such a discretion in the disposal of the goods. If, in the judgment of the defendants, they would not have been safe, owing to the inclemency of the season, in forwarding the goods to Chatham, their instructions were then positive to send them for the winter to Toronto. The pleas, it is submitted, fully confess the breach, and allege no matter in excuse for it; they are therefore bad.—15 E. 400; 3 T. R. 767; 7 M. & W. 151; 1 J. & W. 150.

As to any justification of the deviation from the contract, arising from the plaintiff's agent subsequently assenting to the course the defendants had pursued, this can be no defence in the shape in which it is alleged. The merely telling an agent, *after* a breach of contract, that there has been

such a breach, and his making no objection, when it is obvious none could avail, is manifestly no concurrence in the breach or waiver of its consequences. Besides, there is nothing to show that the agent had any authority or discretion to sanction any deviation from explicit instructions given by his principal. The demurrer must prevail.

Harrison, Q. C., *contra*, contended that the pleas were good. The whole gist of the contract was, that the defendants were to use their best endeavours and judgment to send the goods to Chatham. If in their opinion, it was safer to send them to Hamilton, on their way to Chatham, there was nothing in the contract to prevent their forwarding them by such a route. The court would take judicial notice that Hamilton is in the Gore District, and in the route for goods to be sent to either of the places named. Then, if, in the exercise of that best discretion which the agreement gave to the defendants, the goods were unfortunately lost before reaching their destination, the defendants were not liable, and the facts stated in the pleas must be holden a sufficient legal defence to the action. It is also submitted, that the agent's subsequent adoption of the route taken by the defendants in forwarding the goods, was a good justification. The contract as recognised by him was clearly one within the scope of his authority to sanction. He had the power, unquestionably, to make any contract as to forwarding generally; and if so, he could vary the contract as to any particular mode of forwarding.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that these pleas are both bad.

The effect of the contract, as set out by the plaintiff, and admitted by the defendants, is not to give to the defendants an unlimited discretion as to forwarding the goods; but to bind them to exercise their best judgment and endeavours in complying with certain directions which were given to them. Within those instructions, they had a discretion to exercise as to details of time, mode of transport, &c., but no discretion to depart from the instructions.

Now, it is impossible, I think, to put any other construction upon the contract set out than this, that if the defendants should think it not too late to put the goods *in transitu* for any of the three upper ports named, that is Amherstburg, Windsor, or Chatham, then they were to be insured and forwarded to one of those places; but if the time of year should, in the opinion of the defendants, make that course injudicious, then the goods were only to be forwarded to Toronto, and there left.

The defendants, in their second plea, set up as their defence that they had sent the goods to Hamilton, in the District of Gore, without saying that that was on the way to any of those places; and yet they say that that was in pursuance of their contract; but they do not shew that it was so.

We cannot judicially notice that Hamilton, in the district of Gore, is in the route for goods and merchandise to be sent to either of the places named, and especially goods clearly intended to be forwarded during the season of navigation. If the defendants mean, that they sent the goods to Hamilton, not *in transitu* for Amherstburg, Windsor, or Chatham, with the expectation that they were to pass over Lake



Erie that season, then they deviated from their instructions, which directed them under such circumstances to send them to Toronto.

If they mean, on the other hand, that they sent them to Hamilton, on their way to Amherstburg, &c., then they clearly ought to have insured them from Kingston to their destination.

According to the defendants' own shewing, they sent the goods in a direction which they do not shew to be within their instructions; and during the deviation, they were lost.

The contract, as admitted, was, that they should send the goods by Lake Erie, or to Toronto. The complaint is, that they neither complied with one alternative nor the other; and the defendants, in their 2nd plea, do not attempt to shew that they did either. They mean us, perhaps, to take judicial notice that Hamilton, in the district of Gore, is on the route from Kingston to Amherstburg, &c., by the way of Lake Erie. But we cannot say that it is. We have no judicial knowledge of any such matter; and our private knowledge, if we could apply it to statements on the record, would lead us to a different conclusion.

We might rather infer, that they were sent to Hamilton to remain there until the following spring, or to be forwarded from thence by land; neither of which would be a compliance with the directions given.

The 3rd plea is as clearly bad. It admits that the defendants thought it to be too late in the season to send the goods by Lake Erie, and yet that they sent them to Hamilton, not saying for what purpose or with what intent, and not in any way accounting for their not having sent them to Toronto, which, according to the plaintiff's direction, it was their plain duty to have done.

They admit, then, a breach of their contract, alleging no necessity, and offering no excuse for it; and rely upon their having told the plaintiff's agent that they had broken their contract, and upon his saying that he approved of it, as their justification, though that clearly could not exonerate them.

If they had shewn that the agent had authority to release them from their engagement, and that he did so before they had broken it, that might have answered; but as it is, nothing more is advanced as a defence than that, having deviated from their instructions, they told the plaintiff's agent that they had done so, when it was too late for his approval or disapproval to have any influence upon the course pursued. It is not shewn that he had any discretion in the matter; and if he had, his approbation would not necessarily imply anything more, than that he was willing that the defendants should take their own course for getting the goods to Chatham, running the risk themselves, if anything happened to occasion a loss while they were acting in disregard of their positive instructions.

For anything that is stated in either plea, the defence would have stood on the same legal ground, if the defendants had set forth that they had shipped the goods for Oswego.

*Per Cur.*—Judgment for plaintiff on demurrer.

With respect to the motion that has been made for a new trial, on the ground that the verdict is against law and evidence, and because legal evidence was improperly rejected: the plaintiff, having carried his cause down to trial, to assess contingent damages on the demurrer,



recovered a verdict on the general issue, and rightly, because the contract was clearly proved; and the goods having been lost in consequence of the defendants having taken a different course from that which they were instructed to do, the loss of course falls upon them. It is the damage to the plaintiff resulting from their breach of contract. If the defendants had sent the goods to Toronto, the plaintiff would have had them there, with the option of disposing of them during the winter, or forwarding them to Chatham in the spring. If they had shipped them from Kingston to Chatham, *viâ* Lake Erie, and had insured them as directed, then, in case of loss, the plaintiff would have been indemnified, and the defendants would have fulfilled their contract. But they took a course not contemplated, and contrary to their instructions, and are of course liable for the loss.

*Per Cur.*—Rule discharged.

---

WHITE V. CHURCH.

The court will not entertain a motion for a new trial after the first four days of the next Term, unless under very special circumstances.

In this case the plaintiff moved for a new trial on the fifth day of the term following the assizes, upon affidavits setting forth a surprise upon him, in consequence of the defendant having during the assizes come to a settlement with him, and admitted a certain sum (25*l.*) due, upon which the plaintiff had allowed his witnesses to go away as he alleged; and the defendant afterwards denied his settlement and admissions, and the plaintiff going to trial failed from the want of his witnesses.

These affidavits were only sworn in Cobourg on the fourth day of the term, though the plaintiff resided there, and no explanation whatever was given of the delay in instructing counsel. No reason was assigned in the affidavits for plaintiffs not having moved within the time required by the practice.

ROBINSON, C. J., delivered the judgment of the court.

If the plaintiff found himself unexpectedly under the necessity of bringing on his cause after the alleged settlement, he should have seen that he had the means of proving his case, or should have withdrawn his record, and if the case were really as he declares it was, in regard to the defendant's conduct, he would not have been made to pay the costs of the day.

Whatever the court might do in a case of greater importance, in allowing a verdict to be moved against after the four days, when it appears to be against the justice of the case, and where the delay in moving was satisfactorily accounted for, this certainly is not a case in which we shall make an exception to so strict, and at the same time, so salutary a rule of practice.

*Per Cur.*—Rule refused.

---

DOE DEM THE EARL OF MOUNTCASHEL V. GROVER.

A sale of lands, made before the passing of the 8th Vic. c. 22, in the District of Colborne, one of the new districts, for arrears of taxes, part of which had accrued due before the division of the District of Newcastle, is a legal sale.

The stat. 8 Vic. ch. 22, is a declaratory act, retrospective as well as prospective.

(McLEAN, J., *dissentiente.*)

Ejectment for Lots Nos. 13 and 14, and the south half of No. 15, in the 11th concession of the township of Harvey.

The parties agreed to a special case, admitting the following facts :— The crown by patent, dated the first day of February, in the year of our Lord one thousand eight hundred and thirty-three, granted to Richard Hicks, Lots numbers Thirteen, Fourteen and Fifteen, in the eleventh concession of the township of Harvey.

Richard Hicks, by indenture of bargain and sale, dated on the seventh day of May, in the year of our Lord one thousand eight hundred and thirty-six, conveyed the said lands in fee simple to George Strange Boulton.

George Strange Boulton, by indenture of bargain and sale, dated on the twenty-sixth day of January, in the year of our Lord one thousand eight hundred and thirty-nine, conveyed the same lands to the lessor of the plaintiff in fee simple.

The township of Harvey formed a part of the District of Newcastle, until the fourteenth day of October, in the year of our Lord one thousand eight hundred and forty-one, at which day the township of Harvey and other townships were erected into the District of Colborne, by proclamation, pursuant to the statute. On the thirty-first day of August, in the year of our Lord one thousand eight hundred and forty-three, the treasurer of the District of Colborne advertized in the *Upper Canada Gazette* a schedule of lots and parts of lots and parcels of land, situated in the said District of Colborne, on which eight years' taxes were then in arrear, which schedule included the lots herein-before mentioned.

On the twenty-fifth day of July, one thousand eight hundred and forty-three, the clerk of the peace of the District of Colborne issued a writ directed to the sheriff of the same district, requiring the said sheriff to levy the amount of taxes therein mentioned to be due in respect of the said lots numbered Thirteen, Fourteen, and Fifteen, by sale of such portion thereof as should be sufficient therefor, and delivered the said writ to the said sheriff, who thereupon, on the 4th day of July, 1844 (due notice thereof having been given, and no distress having been found upon the premises), proceeded to sell the lands mentioned in the said writ, as he was thereby directed; and at such sale the defendant, Peregrine Maitland Grover, purchased said lots, number 13, 14, and the south part of lot number 15, in the said 11th concession of the said township of Harvey, and received from the said sheriff a certificate thereof.

The said lands were not redeemed within one year from the date of such sale.

The question for the Court to decide upon these facts was, whether the officers of the Colborne District could sell these lands for the arrears of taxes, part of which were due to the Newcastle District and part to the Colborne District.

*Thomas Kirkpatrick*, of Kingston, for the plaintiff.

*A. Wilson*, for the defendant.

The argument is fully given in the judgment of the court.

ROBINSON, C. J.—The only question submitted to the Court upon the special case is, whether a sale made in July, 1844, of lands in the District of Colborne, for arrears of taxes, part of which had accrued before the division of the District of Newcastle, is a legal sale.

The objection is, that although there was some portion of the arrears due to the District of Colborne, yet that a considerable part of the eight years' arrears of taxes accrued while the land formed part of the District of Newcastle; and that in regard to such arrears, the treasurer of the District of Colborne had no authority to make returns, and no legal foundation before him for the return; and that the other district officers of the District of Colborne were equally unauthorised to act in respect to any arrears of taxes not due to the District of Colborne.

It is contended, that the statute referred to, 8 Vic. ch. 22, has removed all doubt that might otherwise have existed of the legality of the sale.

The statute creating the new district, is silent upon the subject.

The tax is by law made a charge upon the land in the district in which it is situated. Clearly, after the division the officers of the District of Newcastle could not proceed to sell lands which were no longer within their district. The same difficulty did not apply against a sale by the proper officer of the new district; and all that could be said is, that the latter would be recovering a sum of money which could not all be rightly appropriated by the new district. That, however, would shew only, that for the arrears before the division the old district could justly make its claim, not that the land must go free, and the payment be enforced by neither district.

In 1845, the year after this sale had taken place, the legislature, having their attention called to the subject, passed a law expressly declaratory and for removing doubts; and they direct the proceedings for sale to be carried on by the officers of the new district in which the land is situate.

That was the more natural and proper mode of proceeding, if there was to be a sale in either district, and the statute has solved the doubt, by declaring that such shall be the course. But the legislature has not made this provision retrospective in its terms. A declaratory act, however, is in its principle retrospective; and the question is, whether on the face of this declaratory act, we can see an intention that it was only to apply prospectively.

I cannot satisfy myself that it was intended to be prospective only.

MACAULAY, J.—The act 8 Vic. ch. 22, sec. 3, *declares* that the arrears of taxes are payable to and *recoverable* by the district treasurer of the newer district, and to and by him only, and are recoverable by sale of the lands, &c., as if such district had been constituted before at least eight years. This seems to me to be a declaration, however, to explain that such was the legal construction and effect of the former statutes; and if so, of course it warranted the proceedings as set forth in this case.

JONES, J., sitting in the Practice Court, gave no judgment.

McLEAN, J.—The parties have agreed to a special case, for the purpose of obtaining a judgment on a point of law, the decision of which may involve much valuable property in what is now the District of Colborne, formerly part of the Newcastle District.



The question is, whether a sale of land for taxes, made in the Colborne District, is valid, such taxes having accrued in part while the lands were in the Newcastle District, and in part after the separation, and the sale being prior to the act 8 Vic. ch. 22.

At the time of the formation of the Colborne District from certain townships of Newcastle, on the 20th of April, 1838, and not on *the 14th of October*, 1841, as stated in the special case, taxes were due upon the above lots, payable to the treasurer of the District of Newcastle, for the benefit of that district. On the establishment of the new district, the officers of the Newcastle District became incapable of taking any measures for the collection of the taxes due to their district, the last part of the 7th clause of the Act for the formation of the Colborne District expressly declaring, "that no jurisdiction, power, or authority, of whatever nature or kind soever, to the said District of Newcastle, at the time of the formation of such new district as aforesaid, belonging or appertaining, shall longer extend or be construed to extend to the said new district."

The authority thus abolished was not that of any particular officers of the District of Newcastle, but of all who had previously had any control or management of the public affairs of the district. The treasurer of that district could not therefore interfere in the affairs of the new district, and could not take any effectual or legal step in reference to the taxes due to his district, for a period prior to the separation, on lands within the new district.

By the 6th section of the act of 1825, under which sales of land for taxes are authorised, it is enacted that the treasurer of *each district* for the time being shall, at the quarter sessions for each district respectively which shall ensue next after the 1st July, 1828, present to the justices in quarter sessions assembled an accurate account of *all lands* in *his district* upon which the assessments or any part thereof shall have been in arrear for the space of eight years, specifying the number, &c., as the same appears in the schedule furnished by the Surveyor-General, and specifying also the amount due for assessment thereon; and the same duty is required to be performed by the several treasurers at the quarter sessions next after the 1st day of July in each year thereafter.

This clause would seem to warrant the treasurer of the Colborne district returning *an accurate list* of the lands in *his district* on which assessments were in arrear for a period of eight years; but it is, I think, impossible to consider it as giving any such authority. Because, in the first place, the treasurer of a new district could not, *as such*, have any possible means of discovering what lands had or had not paid assessments in the old district; and because, in making up an *accurate list*, he had no authority to rely on any statement or any voucher but his own books. The treasurer of the Newcastle District was, in the eye of the law, as much a stranger to the treasurer of the Colborne District, as the clerk of the peace or the chairman of the quarter sessions, and the statement of one of these officers would be entitled to as much legal weight as that of the treasurer, as to the amount of taxes due on lands in the Newcastle District. The object of the statute was to provide for the collection of taxes due for a period of eight years *in each district*; but no provision is made for the collection of taxes where districts

have been divided. That should have formed part of the several enactments under which new districts have been formed ; but no such provision is found in any of them.

I am the more confirmed in the opinion which I have just expressed, that no treasurer of a new district could legally act upon a return from any individual in another district, previous to the passing of the act of 1845, from an examination of the act of 1819, ch. 7, by which the assessments are imposed. By the 13th clause of that act it is declared, "that all lands described in the surveyor-general's schedule as having been granted or let to lease, shall, from the time they are returned in the said schedule, *be assessed and charged* to the payment of the rates or taxes imposed by that act, *in the respective districts in which they are situated, and not elsewhere.* It was not contemplated at that time, nor in 1825, when the act to authorise the sale of lands for taxes was passed, that lands should be assessed and charged to the payment of taxes in one district, and that they could or should be sold in another district for the amount of such taxes. How could the treasurer of the Colborne District know officially that any taxes were imposed in the District of Newcastle ? By the 8th sec. of the act of 1819, by which alone assessments are authorised, it is declared, "that no new assessment shall be made, until it shall appear to the justices in their respective quarter sessions, or the greater part of them then there assembled, by the accounts of their treasurer or otherwise, that one half of the money collected by virtue of the preceding rate, together with the whole of the monies collected under and by virtue of any act now or hereafter to be in force in this province, shall have been expended for the public uses of the district." It might be that the funds of the Newcastle District did not require any new assessment ; and the magistrates of that district, in general quarter sessions assembled, were at all events the only persons qualified to decide whether such assessment was necessary, and could legally be made or not. The treasurer's return might, under these circumstances, shew lands in arrear for taxes, when in fact no taxes had been imposed, owing to its appearing from the state of the public funds that one half of the money collected under former rates had not been expended for the public uses of the district. All this may have been the case ; and yet if the return of the treasurer of the Newcastle District is to be regarded as a voucher on which the Colborne District treasurer or magistrates could legally proceed, individuals might have their lands sold for taxes appearing to be due, but which in fact had never been imposed. But I have assumed that the treasurer of Newcastle did make a formal return of assessments appearing due to his district on lands in the Colborne District. I have endeavoured to shew that such return, if made, would be no authority for any proceedings for the sale of lands in the Colborne District ; but the fact, for aught that appears, may be, that no such return was ever made. The sheriff or clerk of the peace, or any other person, may have made a statement on the subject on which the sale was founded. It may be urged, that the presumption is that the public officers of the two districts have done what they considered their duty, and, for the sake of argument, I may admit that they have done so. It is, however, plain to me, that a return made to the magistrates of the District of Colborne, by the treasurer of

Newcastle, could not have the same effect as if made to the magistrates of his own district, whose duty, as I have already observed, it exclusively was to decide by law whether any new assessment should be imposed or not. The Colborne magistrates could know nothing of the state of the Newcastle funds, and could not act upon the supposition that because the treasurer of Newcastle had returned certain lands as being in arrear for taxes, the magistrates of the district had, after a consideration of the state of the district funds, actually imposed such taxes.

From the terms of the clause to which I have just referred, it is obvious that the legislature only intended a tax on lands or goods to be imposed when there was a necessity for it, and that the magistrates of each district were to judge of that necessity, and to act according to the state of their funds.

If, at the expiration of eight years, the treasurer's return had been presented to the magistrates of Newcastle, according to the provisions of the statute, they would have been cognisant of the state of the district funds, and aware whether new assessments had been annually imposed or not, and they would be in a condition to decide whether a writ should issue for the levy of taxes in arrear by the sale of lands; but it is quite impossible that the magistrates of another district could, in quarter sessions, be aware of facts necessary to guide them in such a case.

It may be said that these are objections to the exercise of power by the Colborne magistrates, but that they do not affect their right to order a sale of the lands. I think, however, that not merely their right but their power of interference is shewn to be without proper foundation. That power, I believe, has not been attempted to be exercised in other new districts similarly situated; and during the session of the legislature in 1845, a law was passed expressly to provide for all such cases—chap. 22.

This act seems to have been introduced to remedy the difficulty so far as the District of Wellington, composed of parts of the Gore and Home Districts, was concerned; and a clause is added at the end, having a general operation in such cases, and applying the provisions of the act to all districts similarly situated.

Until that act was passed, I think it must be admitted that the owners of land could have gone to the treasurer of Wellington or any other new district, and paid up any arrears accrued since the establishment of the district, without increase, if not more than three years in arrear.

A treasurer could not legally have demanded any increase, because an arrear for a longer period had taken place, while the lands formed part of another district. All that he could claim would be the amount of tax due to his own district, without reference to what had occurred elsewhere, of which he could legally take no cognisance. This enactment therefore was necessary to *authorise* the *collection* of the *increased* rate in the same manner as if no division had taken place; and if so, then it follows that no rate whatever which was due to other districts before the separation could be collected in the Wellington District.

It is alleged that the 3rd clause of the act 8 Vic. chap. 22, is declaratory of what the law has been, and that the sale in the Colborne District, having been made in conformity with what is therein declared to



have been the law, is binding. If the object of the clause were clearly of this character, this inference would undoubtedly be correct; but I am unable to regard the clause in this light.

The preamble to the clause shews, I think, clearly, that its object was not to make any declaration of what the law was, but to introduce new provisions, similar to those made with regard to the District of Wellington. The enacting part of the clause is, "Be it therefore declared and enacted, that in every such case (that is, in every case where taxes were due on lands in the newer districts, of which some portion accrued while such lands formed parts of some older districts), the arrears of taxes *are* and *shall* be payable to, and recoverable by the district treasurer of the newer district, and to and by him only," and then it goes on to provide for the collection of the increased rate, and the manner of proceeding in such collection.

Now, when the sole object of the act, in reference to the District of Wellington, was to remove all doubts as to the mode of proceeding for the collection of arrears due on lands in that district, and the preamble of the 3rd clause expressly states that it is expedient in all such cases to *make provision similar to that made with regard to the District of Wellington*, I cannot give such a construction to the words of the enactment as has been contended for in this case. If the word "declared," in the beginning of the enacting part of the clause, had been omitted, the clause could scarcely be considered as anything more than establishing a remedy in an unprovided case. The introduction of that word can make no difference, as it appears to me, in the sense or object of the enactment: and when it goes on to state that "in every such case (that is, in every case like the present), the arrears of taxes *are* and *shall be payable to and recoverable by* the district treasurer of the newer district, and to and by him only, its operation, I think, is wholly prospective, and has no reference to what the state of the law was at the time; and the part of the clause immediately following shews, I think, that this is the construction intended by the legislature; for it provides that all such arrears of taxes *shall be subject to the same rate of increase* for non-payment, and *shall be recoverable* (not "shall be deemed to have been recoverable"), and (shall be) "leviable by the sale of the lands on which they shall have accrued, or otherwise, in the same manner, under the same provisions, and at the same time, as if such newer district had been constituted and erected as a separate and distinct district at least eight years before the passing of the act, and the lands had formed part thereof and been assessed therein."

The preamble and the sense and substance of the clause, in my judgment, shew as clearly as words can do that the intention of the legislature was not to declare what the law was, but to provide a remedy, and to make the lands subject to the increased rate of tax, in consequence of non-payment, which they otherwise would not be, from the time of their forming part of any of the newer districts.

The acts which authorise the sale and forfeiture of lands for the omission to pay a small amount of tax, perhaps accidentally, are highly penal in their character, and should be construed strictly, and not in a spirit to extend their operation. And as it appears to me, for the reasons which I have imperfectly stated, that the sale in this case was unauthor-



ised by law, and that the legislature did not intend to declare what the law had been, but what it should be after the passing of the act of 1845, I think the verdict should be entered for the plaintiff.

*Per Cur.*—*Postea* to the defendant.

MCLEAN, J., *dissentiente*.

DOE DEM. WHEELER V. MCWILLIAMS.

The court grant new trials for the purposes of justice. They will not grant them to protract an idle litigation about facts, which neither party will take the trouble to make clear, though the means of doing so are shewn to be within their reach.

Where a jury, not thinking it safe to rely on verbal evidence as to the contents of a lost will, when the party offering it is shown to have been aware of the existence of a written copy of the will, which he might have produced at the trial, give a verdict against him, the court will not grant a new trial.

The facts of this case having been fully stated in former applications for new trials already reported—(see vol. 3, page 165), it is unnecessary to repeat them here.

Upon the third trial, as upon the former ones, the plaintiff had a verdict.

*J. Duggan* moved to set it aside, and for a fourth new trial, upon the law and evidence and for misdirection.

*James Boulton*, of Niagara, shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

This is a case in which litigation between the parties seems to have been very unnecessarily protracted, and much needless expense incurred. It was evident from the first (setting aside any question about the will, said to have been made by Hephzebat Wheeler the patentee), that the title must depend upon the fact of her having been legally married to Burton, as alleged, before the year 1800. If she had been so married, then of course the defendant would have no title under a deed from her son born of the alleged marriage with McWilliams, because Burton being living at the time of such alleged second marriage, that marriage could not have been valid, nor the issue lawful.

As Wheeler, the lessor of the plaintiff, has made affidavit that he was present at the marriage, and described when and where, and by whom it was solemnised, it seems very unlikely that he should have failed to apprise his attorney of that fact in time to admit of the usual evidence being procured, for the purpose of shewing upon the first trial, how the fact as to Burton's marriage really was.

If that point had been made clear, the subsequent litigation might have been spared. Yet that was left to be proved by reputation, when evidence of a marriage in fact might have been given, and was, as we think, necessary under the particular circumstances, before the second marriage could be pronounced invalid by reason of the alleged prior marriage.

Then, when we granted a new trial expressly because we thought the marriage with Burton had not been proved, as the law under such circumstances required, the lessor of the plaintiff did not on the second trial take the obvious step of producing proof of the first marriage, from

the quarter where he might have supposed it would be found, and where he should at least have applied for it; I mean from the register of marriages, which, it should have been taken for granted, had been kept by the resident clergyman by whom the lessor of the plaintiff (it now appears) knew it had been solemnised.

For want of such proof, we were again moved on the part of the defendant to set aside a second verdict given for the plaintiff, and in opposition to that application it was that the lessor of the plaintiff for the first time made affidavit of the particulars respecting the first marriage, which, if he had taken the obvious means of proving, instead of leaving the first marriage to rest upon evidence of cohabitation and common rumour, would have saved himself and the court much trouble, so far at least as the case depended upon that point.

We then put it to the defendant, when this affidavit was placed before the court, that he ought to refer to the proper source of information respecting the marriage with Burton, and satisfy himself how the fact really was, before he pressed for a second new trial, which would be of no service to him, if there had really been a prior marriage legally solemnised with Burton.

The defendant did nothing it seems upon this suggestion, and in a case in which both parties seemed equally indifferent about ascertaining the truth, we should certainly not have interfered, at the request of either, for the mere purpose of enabling them to dispute longer about probabilities, when they would not take the trouble to inform themselves of the facts, and if there had been no other question in the case than that upon the alleged first marriage, we should have granted no rule.

But some evidence was given on the second trial, as well as on the first, respecting a will, which the patentee Hephzebat Wheeler was said to have made, devising this land to her children. This will might be an important fact in the case, if she had really been married legally to Burton; because then her subsequent marriage with McWilliams, while Burton was living, must have been invalid; and when Burton died, she was his widow, and not McWilliams's wife, and being discovert, could of course devise the land, as it was alleged, but very imperfectly proved she had done.

On account of the uncertainty respecting the alleged will, we granted, though reluctantly, a second new trial; and at the last assizes for Toronto, the case came a third time before a jury, and the lessor of the plaintiff again obtained a verdict.

We are moved by the defendant to set this verdict also aside, because the marriage with Burton was not proved as the law requires, and because, if that marriage were taken to be legal, yet proof was given of a will, by which the patentee had devised away the land (as in that case she could do) from the lessor of the plaintiff, who claims as her brother and heir-at-law.

Upon this last trial, the parties, strange as it seems, with the same apparent indifference to the truth or untruth of the point about which they have been so long absurdly disputing, both omitted to refer to a quarter perfectly accessible, where proof of the marriage and the particulars attending it could no doubt be had, if the affidavit of the lessor of the plaintiff be true, and where, on the other hand, the defendant could,

upon a search, supply himself with the means of throwing discredit upon the alleged marriage, if no trace of such marriage could have been there found.

We will not interfere further in this case on account of any uncertainty about the fact of the first marriage. New trials are granted for the purposes of justice, and not to protract an idle litigation about facts which the parties will take no trouble to make clear.

As regards the will, it was sworn on the trial that there had been one, but that it had been destroyed, but not by the deviser.

The evidence respecting the will, however, was not such as the defendant had it in his power to procure. He knew well from the evidence given on former trials, that the person who swore he had drawn such a will, and that he had seen it executed by Hephzebat Wheeler, or McWilliams, and had witnessed it, had also stated that he had a copy of it in his possession, in the country, or believed that he had. His evidence was to the same effect on the last trial. He was asked why he did not produce the copy of the will, which he said he had made and still retained. His answer was that he had not been desired to bring it, or he could have done so; and he then proceeded to state from memory what the will contained.

It was objected, on the one side, that the jury could not take an account of the contents of the will from memory, when its precise contents could be shewn by producing a copy.

It was answered, on the other side, that there are no degrees in secondary evidence, where it can be received at all.

The learned judge was willing that the defendant should have the benefit of that principle, not scrupulously considering whether it applied to such an extent, and left it to the jury to find the alleged devise or not according as they might be satisfied of the fact.

The jury found for the plaintiff, not being satisfied, it seems, in regard to the alleged will and its contents.

Under such circumstances, we are against granting a new trial, by any exercise of our discretion, in order to allow the defendant to go a fourth time before a jury, upon questions of fact, which no sufficient pains have been taken to establish.

The defendant cannot complain that the jury did not feel it safe to rely on a witness's verbal account from memory of the contents of a will, of real property, of which the defendant knew, or might have known, he had it in his power to produce an exact copy. Or if he could not have produced it, he should have satisfied himself, and been in a condition to satisfy the jury, that the transcript of the will could no longer be found; and then they might have been more inclined to credit the parol evidence which he gave of its alleged contents.

The affidavits filed in support of this rule are very strong to shew that a will was in fact made. Two of the subscribing witnesses swear positively to it; and further, that this very lessor of the plaintiff was himself the third subscribing witness, and must therefore be well aware of the fact.

If all this be true, it is much to be regretted that the trouble had not been taken to lay before the jury, at the trial, what is now brought before us as ground for setting aside the verdict.



It is not explained why the subscribing witness was not produced at the trial. We cannot admit so bad a precedent as to grant a new trial merely to afford a better chance of making out a case, and we therefore discharge the rule. But if the facts really are as the affidavits now filed represent them to be, the plaintiff would act most judiciously in consenting to a new trial on payment of costs, rather than leave the defendant to become plaintiff in his turn, when he must succeed in recovering, if the will shall be satisfactorily established.

If the defendant is advised that he can shew a good legal title to the premises, he can bring ejectment, when he will see the necessity of taking the usual means of entitling himself to succeed, if the facts are in his favour.

*Per Cur.*—Rule discharged.

### MCGILL v. PROUDFOOT.

A., the assignee of the lessor, sues B., the lessee of a grist mill, in debt for rent. The lease contains the following covenant: "The lessor for himself, his heirs, executors, administrators and assigns, covenants and agrees with the defendant, amongst other things, that he the said John McGill shall and will insure the grist mill demised, and the dwelling house, against loss and damage thereto by fire, and that in case the grist mill should be by mistake burnt down or injured by fire, and the same happens under such circumstances as would enable the said John McGill, his executors, administrators, and assigns, to recover the loss from the insurance company insuring the same; or in case it be not insured, then under such circumstances as would ordinarily entitle him to his loss, if he had been insured; then and in that case, he the said John McGill shall within the ordinary and reasonable time after such fire, make good and repair, or rebuild the grist mill; and during all the time the grist mill shall be unfit for working in consequence of such damage or loss by fire, under the circumstances aforesaid, a fair reduction and allowance shall be made in the rent, to be ascertained and computed by two indifferent arbitrators, one to be appointed by the said John McGill, his heirs, executors, administrators, and assigns; and the other by the said John Proudfoot, his heirs, &c."

Under this covenant, B. puts in a plea containing the following averments: "That after plaintiff's title accrued, the grist mill was accidentally burnt and destroyed by fire, under such circumstances as would ordinarily have entitled the plaintiff to recover the loss arising from the fire, if plaintiff had the grist mill insured against loss by fire. And also, that the annual value of the grist mill was fully equal to £200, as the rent that ought to be due and payable annually for it, and that the sum of £200 was, and is, a fair annual allowance for the use of the grist mill, and is of right to be deducted from the rent to be due and payable from the defendant to the plaintiff, for the destruction of the said mill by fire as aforesaid; and that after the destruction of the said grist mill by fire, neither the plaintiff nor the defendant appointed an arbitrator to estimate the reduction of rent to be allowed for the same, and that the mill has not since been of any profit or advantage whatever to him the defendant.

*Held*, upon demurrer to plea, that under this covenant the assignee, as well as the original lessor, was bound.

*Held also*, that neither the landlord nor tenant having referred the deduction from the rent (which was to be made under the circumstances provided for in the covenant) to arbitration, the tenant was not therefore precluded from making a jury the medium by which a deduction was to be made.

*Quære*: If the landlord had offered to arbitrate, and the tenant had refused, could the reduction then be referred to a jury?

Debt for rent, upon a lease of a mill and other premises, made by one John McGill, now deceased, who devised the estate to this plaintiff.

The lease was set out on oyer, and contained the following stipulations :—

“ That the said John McGill should and would insure the said grist-mill and the dwelling which he occupies, and thereby demised, against loss or damage thereto by fire; and that in case the said grist-mill should by misfortune be burnt down or injured by fire, and the same happen under such circumstances as would enable the said John McGill, his executors, &c., to recover the loss from the insurance company insuring the same, or in case it should not be insured, then under such circumstances as would ordinarily entitle him to his loss, if he had been insured, then and in such case he the said John McGill should, within ordinary and reasonable time after such fire, make good and repair or rebuild the said grist-mill; and during all the time the said grist-mill should be unfit for working, in consequence of such damage or loss by fire, under the circumstances as aforesaid, *a fair deduction and allowance should be made in the rent to the said John Proudfoot, his executors, &c., to be ascertained and computed by two indifferent persons, arbitrators*—one to be chosen by the said John McGill, his executors, &c., and the other by the said John Proudfoot, his executors, &c.; and it was perfectly understood and agreed, that *under no other circumstances*, of fire or any other contingency, was the rent to be reduced or withheld.”

The defendant pleaded several pleas, and among them the following :

“ As to £1100, parcel of the said rent in the said declaration mentioned, the defendant says, that after the making of the said indenture in the said declaration mentioned, and after the accruing of the title of the plaintiff to the said premises, and before any part of the said rent in the said declaration and in the introductory part of this plea mentioned became due and payable, to wit, on the 1st day of July, 1840, the said grist-mill in the said indenture and declaration mentioned, was accidentally burned, consumed and destroyed by fire, under such circumstances as would ordinarily have entitled the plaintiff to recover the loss arising from the said fire, if the plaintiff had had the said grist-mill insured against loss by fire; and the plaintiff did not then, or at any time since the said loss by fire, rebuild, make good or repair the said grist-mill, but has from thence allowed and permitted the said grist-mill to continue in a fallen, ruinous and dilapidated state; and the defendant has not from thence hitherto been able to work or use the same; and the defendant says that the annual value of the said grist-mill was fully equal to the sum of £200, as the rent that ought to be due and payable for the said grist-mill, and the said £200 a-year for each and every year of the said term was and is a fair allowance for the use of the said grist-mill, and is of right to be deducted from the said rent to be due and payable from the defendant to the plaintiff, for the destruction of the said mill by fire as aforesaid; and the said sum of £200 would on a just apportionment of the said rent be found a justly proportioned part thereof, in respect of the said grist-mill, so demised as aforesaid; and the said defendant says, that after the destruction of the said grist-mill by fire as aforesaid, neither the plaintiff nor defendant appointed any arbitrators to estimate the reduction of and to be allowed for the same; and the defendant has not at any



"time since the said destruction by fire as aforesaid, received or derived  
 "or been able to receive or derive any profits, interest or advantage from  
 "the said grist-mill, and the same has not been from thence hitherto of  
 "any value whatever to the defendant; and this the defendant is ready  
 "to verify," &c.

The plaintiff demurred to this plea, objecting that the covenant was merely personal, and not running with the land, and therefore not binding on the assignee of the estate demised.

And further, that there could be no abatement of the rent on account of the destruction of the mill by fire, until the amount which should be deducted had been determined by arbitrators, as the lease directs.

*W. H. Blake* and *P. M. VanKoughnet*, for the demurrer, relied upon the following cases as authorities to support the demurrer: 3 Anst. 687; 14 Ves. 400; 9 Bing. 673; 3 Railway Cases, *Parker v. G. Western Comp.* 17; 3 Tyr. 175; 3 M. & W. 215; 6 T. R. 488; *Platt on Covenants*, 471; 2 Chit. Rep. 482.

*Cameron*, Sol. Gen., and *J. L. Robinson*, contra, relied upon 5 Coke, 16 a; 10 E. R. 130; 5 B. & Ad. 1; 8 T. R. 139; 1 Wils. 127; 2 Ves. jun. 134; 2 B. & P. 131.

ROBINSON, C. J.—With respect to the first of these points, it has already been determined in respect to this same lease, in the case of *Hare & Wife v. Proudfoot*, Hilary Term, 1843—the wife of Hare being devisee of part of the premises demised.

I will therefore only refer to that decision, and to the fact that the mill was in *esse* at the time of the demise, and formed in fact the principal subject of the demise, and that the covenant upon which this question arises expressly binds the lessor, his heirs, executors, administrators and assigns.—*Grey v. Cuthbertson*, 2 Chit. Rep. 482; *Vernon v. Smith*, 5 B. & Ald. 1.

I am still of the opinion, that the assignee of the estate is bound by this covenant.

It is one that from its very nature must necessarily run with the land, or it would be in the power of the lessor, in such case, to change wholly the substance of the contract by assigning; for the amount of rent to be paid depends essentially upon this condition.

The second point—whether there can be an abatement of the rent claimed, until the amount has been ascertained by arbitrators, according to the stipulation in the lease, was also a point discussed in the case of *Hare & Wife v. Proudfoot*.

It became unnecessary to decide it, because we were of opinion that the covenant in the lease, which raised the question, had no application to the rent accruing upon that part of the estate demised which had no connection with the mill; but it was at that time my impression, as I intimated in giving judgment, that before the tenant could claim the precise remedy, under the covenant, of having the rent abated by reason of the destruction of the mill, he must have the amount to be deducted ascertained by arbitration, or must at least shew that he had done all he could for having it so ascertained.

It has become necessary, in the present case, to determine that point; and therefore it must be more closely considered.

The language of the covenant is, that "a fair deduction and allowance

"shall be made in the rent to the said John Proudfoot, &c., to be ascertained and computed by two indifferent persons, arbitrators—one to be chosen by the said John McGill, &c., and the other by the said John Proudfoot, &c.; and it is perfectly understood and agreed, that under no other circumstances of fire, or any other contingency, is the rent to be reduced or withheld."

The defendant, after setting out in his plea the destruction of the mill by fire, avers that, after such destruction, "neither the plaintiff nor the defendant appointed any arbitrators to estimate the reduction of rent to be allowed for the same, and that the defendant has not at any time since said destruction by fire received or derived or been able to receive or derive any advantage from the grist-mill."

I have no doubt that the tenant could, without going to arbitration, have brought an action of covenant against the landlord upon this stipulation, for not rebuilding, because he expressly binds himself that he will rebuild the mill in case of loss by fire; and he could equally, I think, have brought such an action against this plaintiff, as assignee.

The question is whether the cases cited of *Kill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 T. R. 139; *Tattersall v. Groote*, 2 B. & P. 131, and *Mitchell v. Harris*, 4 Ves. jun. 136, and the language of the court in 14 Ves. 400, go further than to determine that the remedy by action on the covenant, in case of breach, is not interfered with by a stipulation to refer the damages to arbitration.

I can see clearly that the case before us does not come within the reason of those cases in equity, in which the court has declined to decree specific performance of an agreement to purchase, by putting the court in the place of arbitrators, and taking upon themselves to fix the price of an estate, when the parties had agreed that it should be settled by reference to arbitration; though I think it likely that the distinction between that class of cases and the present did not sufficiently strike me while the case of *Hare & Wife v. Proudfoot* was under consideration.

The landlord has not merely covenanted in this case that he will rebuild or pay such damages as arbitrators shall appoint. Upon such a covenant I should have no doubt that the remedy for damages in an action for not rebuilding, would lie without a reference.

The stipulation is intended to go further, and give to the tenant the precise and more convenient remedy of setting off the damage occasioned by the loss of the mill against the accruing rent. That is an advantage which the common law would not have given him, nor the Statute of set-off, and which could not be obtained by any form of action or pleading in this court. It is given wholly by the convention of the parties; and my doubt is, whether the tenant can have the benefit of that particular mode of redressing himself, without first having the amount which he shall be allowed to deduct ascertained as the agreement points out.

The landlord may say truly, I only agreed to that mode of settling the amount, upon condition that it shall be ascertained by arbitrators.

Is it right to say of this stipulation, that it is one indivisible agreement that the landlord shall deduct such amount as arbitrators shall direct? If it were strictly so, then I should be inclined to hold that we cannot compel the landlord to deduct from his rent a sum which arbitrators have not yet ascertained.

But the language is not that in effect. The covenant first says distinctly and positively, that "*a fair deduction shall be made from the rent,*" and then provides how the amount is to be ascertained, thus excluding this court from determining what would be a fair deduction, and leaving that, as a matter of necessity, to the decision of arbitrators to be chosen by the parties.

This seems to bring the case within the reason of those decisions which I have cited. My brothers are all of the opinion that such is the legal effect. And certainly the ends of justice are much favoured by such a construction; for it is most unreasonable that the landlord should be suing for his full rent, though the mill was burnt at an early period of the term, and never rebuilt, and without his making any attempt to have the damages estimated as the lease points out; for it was as much incumbent on him as on the tenant to take the first step towards having an adjustment by arbitration, and more incumbent on him, when he made up his mind to press for his rent.

I have still some doubt on the point, but I consider the weight of argument to be in favour of the tenant on this point; and my brothers look upon the point as clear.

The plaintiff urges another objection, not assigned as a cause of demurrer, and not noted in the margin of the demurrer-book, as the practice requires.

The defendant objects to his taking this new objection on that account and we certainly are not bound to notice it, and may properly decline to do so, unless it bears on the substantial merits, so that injustice would be done if it were passed over.

This objection is, that the plea should have averred that the plaintiff had insured the mill, and that the loss happened under such circumstances as that he could recover for the loss, or that he had not insured, and the loss occurred so that he could have recovered if he had been insured.

What he asserts in the plea is, "that the mill was burned under such circumstances as would ordinarily have entitled the plaintiff to recover, if he had had the mill insured," &c.; without averring whether the mill was or was not insured.

I think we should not give way to this objection, which the plaintiff, for the reason cited, is not entitled to urge; for it has nothing to do with the merits.

If the plaintiff did insure, and has failed in recovering because the loss did not entitle him under the circumstances to recover, he could have pleaded that. It is a fact within his knowledge. The defendant had no means of knowing whether he had insured or not, or where, or on what terms; for he might have insured in any office in Europe or America; and the natural meaning, I think, of the agreement is, that the defendant may, in the first instance, hold the plaintiff liable, if he can say with truth that the loss occurred so as to entitle the plaintiff to recover if he had been insured on the ordinary terms. And then, if the plaintiff can relieve himself by shewing that he was actually insured, but could not recover, it would be for him to plead in his defence facts best known to himself, and perhaps known only to himself and the office in which he may have insured.



MACAULAY, J.—I think the defendant may claim a deduction of rent in this action, in consequence of the fire.

His right to an abatement is not made by the lease to depend upon the decision of referees as to the amount. The agreement is, that during all the time the grist-mill should be unfit for working, in consequence of such loss by fire, a fair reduction and allowance should be made in the rent to the said defendant, (it then proceeds) to be ascertained and computed by two indifferent persons, arbitrators—one to be chosen by each party.

I look upon this as a substantive agreement for a deduction, in case of destruction by fire, under the circumstances mentioned in the lease; and regard the clause respecting the ascertaining of the amount, not as conditional, but as a mode agreed upon for ascertaining the sum, and in effect nothing more than an agreement to refer the amount to be deducted to arbitrators, superadded to the agreement for a deduction.

Certainly the plaintiff could not, by refusing to arbitrate, compel the defendant to pay the rent reserved in full, and leave him to what remedy he might have by a cross action, for such refusal on the plaintiff's part, and through that indirect means recover compensation or deduction.

This would be treating the covenant to pay rent, and the agreement for a contingent abatement, as totally independent; whereas I consider them as if the one had immediately followed the other as a proviso, providing that loss by fire should be a condition subsequent, on the happening of which the rent was to abate.

It may be said that the agreement for such abatement was for the defendant's benefit, and that he should have taken the initiative and called upon the plaintiff to go to a reference. But, even if so, it was equally open to the plaintiff to have called on the defendant to arbitrate; but neither having done so, and the plaintiff having sued the defendant for the *whole* rent (to the whole of which he is clearly not entitled), I certainly think the court not ousted of its jurisdiction to enquire through the medium of a jury, what the abatement owing to the loss by fire ought to be. It is manifestly just, and I think the legal right of the defendant.

The objection to the plea mentioned in the argument, that it is bad for not admitting that the house was insured, or expressly denying it, but only impliedly doing so—in short, for reciting only one of the two contingencies on which the rent was reduced owing to loss or destruction by fire—is not made a point by any marginal note.

It may be bad on special demurrer, or even on general demurrer, but it is not assigned as a cause of demurrer, either general or special; and though mentioned in argument, is not so clearly bad on general demurrer as to require the court to notice it upon such bare suggestion, the defendant not having been called upon to prepare to answer it.

I think the authorities shew that the lessor's covenant for abatement of rent, in the event of loss by fire, runs with the estate and binds his devisee, and that the same defence thereunder can be set up against this action that could have been urged were the original lessor the plaintiff.—1 Platt, 471, 457, 183; Vernon v. Smith, 5 B. & A. 1; Tatem v. Chaplin, 2 H. B. 133; Hotham v. E. I. Comp. 1 T. R. 638; 3 M. & W. 215; Kill v. Hollister, 1 Wils. 129; Tattersall v. Groote, 2 W. & P. 131; Gornley v. Duke of Somerset, 13 Ves. 431; 5 Ves. jr. 845-8; 6 M. & S. 121.



McLEAN, J.—The first objection, that the covenant for the reduction of the rent was only personal, and did not bind the plaintiff, the assignee, I think was given up on the argument. But at all events, the lessor bound himself, his heirs, executors, administrators, and assigns, as to the insurance of the mill and dwelling-house, and the reduction of the rent in case of injury or destruction by fire, under certain circumstances, until it should be repaired or rebuilt; and the plaintiff as assignee is bound by that covenant, and must submit to such reduction as the lessor must have submitted to if living, if the fire took place under any such circumstances as the lease specifies.

The defendant claims the reduction from plaintiff as assignee, alleging that the fire did take place under such circumstances as would ordinarily have entitled the plaintiff to recover the loss arising from the fire, if the plaintiff had had the grist mill insured against loss by fire. This averment of the circumstances under which the fire took place, being such as would ordinarily entitle plaintiff to recover the loss, if the premises had been insured, is, I think, sufficient. The defendant was not bound to state that it was burnt under such circumstances as would entitle the plaintiff to recover the loss from the insurance company insuring the same. He could not probably be aware whether the mill was insured or not; and it was sufficient for him to shew that, if insured, the loss could have been recovered, and, in fact, that nothing on his part, in the occupation of the premises, could affect or prevent such recovery.

The object of the restriction, or rather of the imposition of terms, under which a fire must take place, to entitle defendant to a reduction of rent, was evidently to guard against such reduction, if by any means connected with defendant's occupation of the premises, the lessor should be deprived of the benefit of his policy of insurance. The rent was to continue, if the insurance could not be recovered, the mill being insured, or if the mill should be burnt under such circumstances as would ordinarily prevent a recovery in cases of insurance.

The plaintiff also urges as a ground of demurrer, that the reduction of rent was conditional; and seems to consider *the mode* appointed for ascertaining the amount of reduction as *the condition*.

He does not object to the circumstances, as alleged by defendant, under which the mill was burnt, as forming a condition; but objects to the reduction, on the ground that no arbitration has fixed the amount of it as intended by the lease.

Now the right to a reduction, in the event of the mill having been burnt under particular circumstances, does not depend upon any arbitration. It is clearly agreed that such reduction shall be made, and the mode of fixing the amount is provided for.

Had the testator been living, notwithstanding this part of the agreement, he might have sued as the plaintiff has done, and his action would not be barred by his agreement to refer the amount of reduction to arbitration.

The defendant could not prevent the plaintiff suing him, if he chose to do so; and it does not rest with plaintiff, after having brought the defendant into court, to say that no reduction shall take place, because the amount is not ascertained by arbitration, when he is himself, or at least may be, the only person to blame for its not being so ascertained.

The plaintiff, having chosen to bring his action, can only recover such amount of rent as a jury may consider fairly due, after deducting from the rent of the whole premises such amount as they may think reasonable for the use of the mill. Since the destruction of the mill, the lease shews that plaintiff is entitled only to a reduced rent; and the amount can only be ascertained by a jury.

JONES, J., in the Practice Court.

*Per Cur.*—Judgment for defendant on demurrer.

### MCGILL v. PROUDFOOT.

A bond of submission to an arbitration, signed by the wife *as well as* the husband, is a valid bond.

A. is substantially interested in a lease. B. becomes security for A.'s performance of covenants. D. and A. refer disputes connected with the lease to arbitration.—*Held*: that it is no objection on the part of D. to the bond of submission, that B. is not a party thereto.

Where several parties make a joint submission of their claims the award is final, though it does not distinguish the portion of money each party is to receive.

Construction of submission-bond—as to whether the umpire therein named has the power simply to report upon the state of certain premises, or further than this, to estimate their value, and make an award thereupon.

Covenant by plaintiff, devisee of John McGill, deceased, on a lease made by John McGill to defendant of certain premises therein mentioned, and which defendant agreed to give up in good and tenantable repair, ordinary wear and tear excepted.

Breaches assigned:

1st, That defendant did not put the fences on the premises in condition and repair, and did not deliver the same up in repair to defendant at the expiration of the term.

2nd, Not repairing dam, raceways, and flumes of the mills demised, but suffering the same to be in a ruinous, prostrate, decayed, broken, damaged, and bad state, for want of necessary repairs, and for want of ordinary and proper care. And that defendant suffered the water to make a breach round and through the dam, and the same to continue till and at the determination of the lease, by reason whereof the water for the working of the mills escaped and flowed away from the mills out of the pond where the same should be collected for working the said mills; and the saw mill was left without sufficient water to work it, and the dam was sapped, weakened, and rendered useless. And that defendant delivered up the dam, raceways, flumes, and appurtenances, in such bad order and condition, and so out of repair, not arising from ordinary wear and tear, that the saw-mill, at the time the same was given up, was standing dry and without sufficient water to work the same.

3rd, Suffering houses, barns, &c., to be out of repair, and leaving the same out of repair at the expiration of the lease.

4th, Injury to the implements of milling belonging to the grist mill demised.

The defendant cravedoyer of the lease, and set out the same, in which defendant covenanted "that he should and would, at the expiration of "the term, or other sooner determination thereof, quietly and peaceably "yield up the premises, &c., in good and tenantable repair and condition, *usual* and ordinary wear and tear excepted." And it was mutually agreed that two persons should be chosen, one by each party, who should view all the premises, and the several implements of business and appurtenances should be enumerated in one inventory, to be made and taken by the same, and the several articles therein mentioned, together with what may be necessary for additional improvements, to be made and accounted for to the lessor.

Plea :

As to 1st breach, Performance.

As to 2nd, That he did not suffer the houses to be out of repair, or deliver up the same out of repair.

As to 3rd, That he defendant did at all times uphold and keep in repair the mills, dams, raceways, fooms, houses, out-houses, and implements of milling, on the premises devised; and did not permit the implements of milling used in working the mill to become out of repair or in a bad or ruinous condition, but delivered up the same to plaintiff in good order.

As to the 4th, A reference to arbitration, and award made thereon between plaintiff and certain other persons claiming part of the demised premises under the will of John McGill, to wit, James McGill, James Hare, and Helen Hare, his wife, Margaret Orr, and William McGill, of the one part, and defendant, of the other part, of all matters in difference relative to the said breaches; by which the parties bound themselves each to the other to refer the said matters in difference to the award or valuation of Alexander McGlashan and John Carey, and in case they should not agree, then to the arbitration of Ira Van Valkenburgh, award to be made on or before the 23rd July, 1845, and umpirage or valuation of Ira Van Valkenburgh, in case of their disagreeing, on or before the 28th of July, 1845, setting out award or valuation of Ira Van Valkenburgh, under his hand and seal, of and concerning the said breaches of covenant; whereby it was awarded, that the value of the repairs to be done by defendant, according to the terms of the lease, to the dwelling-house and fences about the garden, the drying kiln, to the four small houses and blacksmith's shop, to the saw-mill, grist mill, floom, repairing the barn and embankment from the saw-mill to the head-gates, for the head-gates and mill-dam gates, and mill-dam head, and for the implements of milling, and repairing the fences, and all other repairs on the premises, should be taken at the sum of 38*l.* 1*s.* 3*d.*, and the sum of 3*l.* 10*s.* for the occupation of certain lands in crop after the expiration of the lease, by one Dunwoodie, making 41*l.* 11*s.* 3*d.* awarded to be paid to plaintiff on 1st September, 1845, which amount defendant averred that he paid to the plaintiff and James McGill, Peter Hare, and Helen Hare, his wife, Margaret Orr, and William McGill, in satisfaction of the damages sustained by plaintiff on account of the breaches of covenant in the declaration mentioned, and which it was averred they had accepted.

Plaintiff cravedoyer of the bond of submission and condition, which



were set out, together with several recitals referring to the matters to be submitted, and the object of the reference.

The 3rd recital was : Whereas proper persons have been named, one by each of the parties, to *examine* and *report* upon the state of the premises, viz., John Carey and Alexander McGlashan, and in order to bring *all* matters to a satisfactory conclusion, it is agreed, by and between the parties, to appoint an umpire (it not being provided by the lease), who is, in case of the said persons named by the parties to examine the premises disagreeing in their award, to have full power to make an award which shall be binding upon all parties ; and in case of such disagreement by John Carey and Alexander McGlashan in their *award* or valuation, it is agreed that Ira Van Valkenburgh shall make an award and valuation which shall be binding on all the parties.

The condition was, that if plaintiff and other persons named should abide by and perform and fulfil the award or valuation of Alexander McGlashan and John Carey in all matters and things, so as they should make their award or valuation in writing, ready to be delivered at a certain day (23rd July, 1845) ; and in case they should not agree, or should not make an award or valuation of *and concerning* the *matters aforesaid*, then if the said plaintiff and others should abide by, fulfil and perform the umpirage, award and valuation of Ira Van Valkenburgh, so as he shall make his award or valuation ready to be delivered on or before the 28th day of July, 1845.

The plaintiff demurred to the 4th plea :

1st, On the ground that the submission was not a good and valid submission, and could not procure a final settlement, inasmuch as some of the parties interested appear to have been *married women*, who could not legally execute a bond of submission ; and on the further ground that Alexander Proudfoot, named in the lease, should have been a party.

2nd, That the award was not warranted by the submission contained in the bond ; and that the umpire, Ira Van Valkenburgh, had exceeded his authority in this, that under the submission, the arbitrators had authority only to *report* upon the state of the premises, and to enumerate the portions thereof requiring repair, and the repairs which were required to be made ; and had no authority to estimate the value of the repairs, or to fix any sum as damages, or to award any sum to be paid by or to any of the parties.

3rd, That the award was bad, in not having distinguished what portion of the sum awarded to be paid by the defendant was to be paid to each of the parties to whom it was so awarded ; and the same was not a final settlement of the matters submitted.

*W. H. Blake* and *P. M. Vankoughnet*, for the demurrer, relied upon 1 B. & B. 350 ; 1 Vern. 259 ; 1 Q. B. R. 113 ; 1 Dowl. N. S.

*Cameron*, Sol. Gen., and *J. Lukin Robinson*, contra, relied upon 6 M. & G. 40 ; Stephens, N. P. 131 ; Salkeld, 70 ; Com. Dig. Award, C.

ROBINSON, C. J.—There is no doubt that the award does extend to the causes of action declared upon ; and the only question as to the award being conclusive must turn upon the extent of the submission, as it appears when set out by the plaintiff in oyer. Does that open to the arbitrators the investigation into such matters of complaint as the declaration states ? I think it does.



Clearly the parties could go beyond the lease in this respect, if they thought proper; they could submit everything.

The lease says, that the arbitrators to be appointed "should view the premises, and consider what may be necessary for additional improvements." These words are comprehensive, though vague and indefinite. But then the bond recites that the parties had appointed arbitrators to examine the premises; and that "*in order to bring all matters to a satisfactory conclusion,*" they had appointed an umpire, in case the arbitrators should not agree.

This was going further than the lease, which made no provision for an umpire.

It shews that the parties desired and intended a full and final settlement by arbitration; and certainly no settlement would be full and final which would leave a dispute open about any such breaches as the plaintiff is now suing upon.

Then in the bond the parties submitting give power to the umpire to make an "*award which shall be binding on all parties.*" If the parties considered that what they were doing was in strict accordance with the intention of the lease, then their own construction of the lease should be binding upon them as regards the submission; if they meant to do more than the lease bound them to, they are equally bound to abide by the reference, such as it was.

We have then to consider that an award has been made, which certainly does not seem to exceed the submission, and which does expressly award a certain sum to be paid as a satisfaction for such injuries as the plaintiff is now suing upon; and the plea states, that before the commencement of the suit, the defendant paid to the other parties to the submission, including among them this plaintiff, the "sum awarded to be paid in satisfaction of the damages, amongst others, sustained by the said plaintiff on occasion of the breaches of covenant in the declaration mentioned."

And this the plaintiff admits by demurring.

This, in my opinion, fully ratifies the award, and precludes the plaintiff from sustaining his action in respect to the same breaches. I refer to the case of *Hunter v. Rice*, 15 E. R. 99.

This is not pleaded as a payment made after a breach of the award, and in satisfaction of damages by occasion of such breach, in which case the plea must have stated that the plaintiff *accepted* the money *in satisfaction*; but it is pleaded as a payment in compliance with the award, which therefore the other party could not refuse to accept.

I am of opinion that the other grounds of demurrer to the plea specially assigned, are not tenable.

Mrs. Hare, no doubt, as a married woman, could not submit to arbitration; her execution of the bond was therefore an insignificant act. But her husband could submit on her behalf; and he is a party to the bond.

Then, as to Alexander Proudfoot not being a party to the submission, he is a party to the covenant sued upon, and therefore is interested in its performance. But the covenant is joint and several; and John Proudfoot, being liable severally, could submit on his part all claims to which he would be liable, as he could be severally sued at law upon them,

and satisfaction obtained through him for the whole damages would finally settle all claim in respect of that breach, as well in regard to Alexander Proudfoot as himself.

Then, as to the remaining objection, the parties interested, as representing the estate of the lessor, all chose to submit jointly, as no doubt they might. The award is consistent with that submission, and directs the money to be paid to the parties submitting, or any of them for the others; and the plea states that the defendant paid the same to *all the parties*.

They can none of them object to the payment being so made; for it is in accordance with their submission; and they must be left to distribute it among themselves.

MACAULAY, J.—The covenant declared on and the breaches assigned are not before us, the demurrer delivered not containing any part of the declaration.

Assuming therefore that the subject-matter of the award embraces the breaches to which it is pleaded, and that attention is only required to the sufficiency of such award under the submission, upon the objections assigned for special causes of demurrer, it appears to me that the defendant's covenant required him to deliver up possession at the end of his term of the demised premises, with all additions, improvements, and betterments, &c.; and that it was in effect mutually agreed that two persons should be chosen, one by each party, who should view all the premises, and that the several implements of business and appurtenances should be enumerated in an inventory to be made and taken of the same, and that the several articles therein mentioned, together with what might be necessary for additional improvements to be made, should be accounted for by the defendant. Such is the effect of the agreement in the lease.

The recital in the bond, as set forth, varies therefrom. It recites, that by a clause in the lease, two persons were to be chosen, *on or before the expiration of the lease*; whereas it is obvious in the lease itself, that, included in the demise of the mills, &c., were implements of business, of all which an inventory was to be made. There is not a word said about the *valuation*, nor does the recital in the bond follow in full the terms of the lease. Looking at it then apart from the recital, or adopting the recital as correct, or taking it together with the lease, the bond recited that two persons had been named to *examine and report upon the state of the premises; and that in order to bring "all matters to a satisfactory conclusion,* it was agreed to appoint an umpire, though not provided in the lease, with full power to make an award which should be binding on all parties; the terms usually adopted throughout being, in reference to the claim in the lease referred to, "*valuation or award,*" or "*award or valuation,*" and the condition is, to abide *the said award or valuation* of the two referees *in all matters and things*, and if they should not make *an award or valuation* of and concerning *the matters aforesaid*, then to abide the umpirage, award, and valuation of the umpire, so as he made his award or valuation by a certain day.

The umpire then makes a valuation of repairs to be done, and directs payment of the amount by the defendant.

It seems to me, as respects the repairs and valuation spoken of in the submission and award, the award is fully warranted by the submis-

sion, regarding it as having taken place with a view to the agreement in the lease referred to, or more in accordance with its true meaning as an independent submission on the subject of repairs, under that part of the lease which relates to the delivering up of the premises in good repair, and about which the parties disagreed, and for which this action is brought.

But independently of all this, the money is averred to have been paid to the plaintiff and the other referees; and it is admitted by the demurrer.

In 15 E. 102, *Hunter v. Rice*, Lord Ellenborough says, "If indeed 'Sharp had accepted the money tendered, that would have been a ratification of the award, and an assent on his part to the transfer of the 'property.'"

As to one of the referees being a *feme covert*, I do not see that it is material. Her husband was a party, and competent to submit on his and her part what was submitted; and the sum awarded was paid to the plaintiff and all jointly.

It does not appear that the umpire was required to award touching the interest of the parties separately. It was originally a demise to the defendant of all the premises in the lease; and the lessor's devisees afterwards joined in one joint reference on the subject of repairs, and jointly accepted the amount awarded.

Under such circumstances, I think it must be inferred that they undertook to apportion it among themselves.—12 M. & W. 792; *Perry v. Mitchell*, *ib.* 804; 10 A. & E. 144, *Price v. Popkin*.

I do not see that Alexander Proudfoot was necessarily a party to the reference. He was merely a security for the defendant.

I think the award so far as this case goes was warranted by the submission, and that in relation thereto, the umpire did not exceed his authority. Had he not affixed a *valuation*, his award would have been bad.

It also seems to me final.

The other special objections have been already answered.

McLEAN, J.—It does not appear to me that any of the grounds of demurrer in this case are tenable.

It was quite competent for all the parties interested in the estate of the late John McGill, which was leased, to refer all differences arising as to the terms of that lease to arbitration, and if the bond has been signed by husband and wife, for greater precaution, when it would have been sufficient if signed by the husband alone, surely that cannot vitiate the submission.

The husband and wife may convey their estate; and if so, they may undoubtedly refer to arbitration any matter relating to it.

By the lease it is plain that the defendant is the person substantially interested, and that Alexander Proudfoot is only a security for him. If the parties chose to submit their differences with John Proudfoot alone, and they did so, and a proper award has been made, it is rather an odd objection to the submission that they chose to refer without making Alexander Proudfoot a party.

It is objected that the award is not warranted by the submission contained in the bond; and that the arbitrator has exceeded his au-



thority in this, that McGlashan and Carey had authority only *to report* upon the state of the premises, and to enumerate the portions requiring repair, and the repairs required; but no authority to *estimate* the value, or to fix a sum to be paid to any of the parties.

Now the parties bind themselves to abide by, perform, and fulfil, the *award or valuation* of McGlashan and Carey; or if they should not agree, and shall not make an award or valuation, then they are bound to abide by, fulfil, and perform, the umpirage, award, and valuation of Ira Van Valkenburgh.

In the recital as to the appointment of proper persons as arbitrators it is stated, that such persons have been named to *examine* and *report* upon the state of the premises; and in order to bring *all* matters to a satisfactory conclusion, they had agreed to appoint an umpire, in case the parties named to examine the premises should disagree in *their award*, such umpire to have full power to make an award to be binding on all parties.

Now it is plain that the parties, by their submission, intended to refer and did refer all claims arising under the lease against the defendant, for repairs or otherwise, according to the provision contained in the lease on that subject; and it is also plain, that the persons chosen, though it is stated that they were chosen to *examine* and *report* upon the state of the premises, were to make an *award* by which all parties were to be bound, and that such award was to be for the value of the repairs, &c.; for the parties agree to be bound by their *award or valuation*.

But the authority of the umpire, or third arbitrator, is not limited, as it is contended that of the persons first named was, by the submission to *examine* and *report* upon the *state* of the *premises*. He, in case of those persons disagreeing, or not making an award, had full power by the submission to make an *award*, umpirage, or valuation, which should be *binding* on *all parties*. He had authority to make an award or valuation in reference to the matters submitted; and it is admitted by the demurrer that he has done so, as alleged by the defendant.

The last objection is, that the award is bad, in not having distinguished the portion of the amount awarded which each of the parties should receive; and that the award is not a final settlement of the matters submitted.

When all the parties interested in the demised premises made a joint submission of their claims, they must be taken to have agreed among themselves as to the distribution of any sum awarded; but whether they did so or not, cannot affect the award. They may have differences between themselves as to the division of the sum; but as between them and the defendant, the award, if within the submission and otherwise valid, as I think it is, is conclusive and final, and puts an end to all claims under the lease, on matters which were referred, and which have been arbitrated upon, more especially if the defendant has paid, as he alleges, and the parties have accepted, the amount awarded in satisfaction of such claims.

JONES, J., in the Practice Court.

*Per Cur.*—Judgment for defendant on demurrer.



## KEESAR V. EMPEY ET AL.

Particulars of demand served by the plaintiff on the defendant, containing an admission of payment on account, and shewing a balance in favour of the plaintiff, are put in at the trial by the defendant to prove the payment. The plaintiff then relies upon the particulars so put in by the defendant as a link in the chain of evidence, to shew that he was entitled to a verdict for the balance therein mentioned.

*Held*: that though the particulars rendered by the plaintiff, and made use of by the defendant, were not evidence *per se* of the balance as therein stated, still that the whole of the particulars ought to go to the jury as a fact, in connection with other facts in the case, to assist them in forming their verdict.

This was an action of debt on bond, and on simple contract, on the common counts.

At the trial the jury found for the plaintiff on the first and second issues, and for the defendants on the others. Damages for the plaintiff, £95.

The plaintiff in his particulars, after charging the defendants with sundry items in account, amounting together to 593*l.* 6*s.* 9*d.*, subjoined a credit "by two payments and interest, 443*l.* 5*s.* 6*d.*—balance due the "plaintiff, besides interest from the 1st February, 1846, 150*l.* 1*s.* 3*d.*"

*P. M. VanKoughnet* moved for a new trial on the law and evidence and for misdirection; and relied upon the insufficiency of the evidence to enable the plaintiff to recover on the common counts,—the verdict being rendered only on those counts. He cited 11 M. & W. 576; 2 M. & W. 764.

*Draper*, Att'y Gen., shewed cause.—He relied upon 12 M. & W. 545; 12 L. J. N. S. 32; 1 Q. B. R. 403, 397.

ROBINSON, C. J.—I cannot see that there is any room for a question about the propriety of the verdict.

It is true, that the bill of particulars which the plaintiff had rendered to the defendants was laid before the jury by the defendants, for the purpose only of shewing that in his particulars the plaintiff had himself admitted that they had paid him on account 443*l.* 5*s.* 6*d.*

Of course the defendants had no desire that the particulars should give any support to the plaintiff's claim, and produced it for no such purpose. It did shew, when they produced it, that the plaintiff had by his bill, rendered to them, claimed items of account, to a considerable amount, exceeding the payments admitted.

If the plaintiff had rested his case at the trial on any such principle, as that the bare production of this paper by the defendants in court was sufficient to entitle him to have all that he claimed on the face of it allowed to him, upon the principle that the statements on both sides of the account must be credited, or neither, he would have been contending for what would have been manifestly unreasonable; and, if the learned judge had so ruled, there would, in my opinion, have been good ground for this application. But that was not the course taken at the trial.

The plaintiff had proved that the defendants had had an account of his long enough in their possession to examine all its items at their leisure; and he gave evidence, which I think was strong, to shew that the defendants by their conduct and declarations in regard to this account, objecting to some small items and not to others, had virtually and impliedly admitted the account to be correct in the main, and with those particular exceptions.

In such cases, courts of justice must pay some respect to the mode in which mercantile business of this kind is to a great extent unavoidably carried on; and they are not, and ought not to be, unreasonably rigid in exacting proof by a witness of the delivery of every article by a shop-keeper to his customers.

If they were to be so rigid, great inconvenience would often be occasioned, and great injustice suffered. In a large course of dealing confidence is mutually reposed, that the receipt of goods which a customer has had, will not be vexatiously and dishonestly denied by him.

The vendor cannot be a witness for himself, yet he cannot be expected to be always so distrustful of those dealing with him as to refuse to serve a customer unless in the presence of a third party, or to exact a receipt for every article purchased. Clerks will be sometimes out of the way; and when they have acted for their employer, various casualties may afterwards deprive the latter of their evidence.

The customer can seldom be in doubt whether he had the goods or not; and if after an account has been delivered to him and left for weeks or days in his possession, he makes no attempt to shew anything improperly charged, but, in conversing about the account objects to certain items, making no complaint as to others, it is left to the jury, looking at his conduct and declarations, under all the circumstances, to say whether they are satisfied that he really did receive the goods charged to him.

If the jury are satisfied (and so find) that he did receive some items of a long account, which were not specifically proved, as well as others which were so proved, the court, unless they see reason to apprehend that the verdict is unjust, will not too rigidly scan the evidence afterwards, in order to see whether the delivery of every article has been clearly established.

Now, after repeatedly looking over the evidence in the present case, I must say, that I think there was sufficient evidence of this description to enable the plaintiff to recover, if the jury were satisfied by it that all was right. I should not have thought it proper to disturb the verdict, if the circumstance had not occurred at the trial, of the defendant's relying upon the plaintiff's particulars for establishing his payments.

The plaintiff may have imagined that that materially strengthened the other proof which he had brought; but the present verdict in his favour should, in my opinion, have been equally allowed to stand, if he had no fancied support of that kind to rely upon. I should have been equally indisposed to grant a new trial, and especially since the defendants have not on oath denied the receiving of the goods, and lay no ground before us for supposing that there will be any injustice done by the verdict.

The learned judge was quite right, I think, in stating to the jury, that the defendants having called their attention to the plaintiff's own statement of his accounts, they must look at, and must consider the whole as before them. There is no authority for saying that the debtor side of the account could legally have been kept from their view; and, having seen it, the jury are at liberty to consider it in connection with all the evidence given.

The plaintiff did not admit simply that the defendants had paid him £443, but that they had paid him that sum on account of a demand of

£593. He asserted that, and nothing more or less; and the jury should see that he did assert the larger claim on the one hand, while he made the admission on the other; and they have to deal with the case on the whole evidence, of which the document in question formed a part.

There is, in my opinion, no difference in the principles on which such evidence is received in criminal and in civil cases. A prisoner's examination is evidence against him, so far as it amounts to a confession. It is not evidence on which *he* can rely for acquitting him, because his own assertions in his own favour are not evidence for him in the legal sense of the term; but no part of his examination can be kept out of view of the jury. They are to see all or none. They are not to be told that the prisoner made an unqualified confession, when he did not. As for instance, a prisoner may acknowledge that the goods which he is charged with stealing are the prosecutor's, adding that he had borrowed them from the prosecutor. The jury will be satisfied from this, that the goods are the prosecutor's; and in the absence of all other evidence, they might dismiss wholly from their minds the prisoner's assertion, that he had borrowed them; but still the jury must have the statement as it was given; and it is in their breasts to deal with it in connection with all the evidence given. They are not to receive it in a mutilated form.

If in a civil case we could suppose anything so improbable, as that a jury should, without any other evidence whatever, allow a plaintiff a large sum of money, merely because he had demanded it in an account or bill of particulars, in which he had given credit for a small sum as paid on account, we need have no doubt that the defendant would obtain relief, but this is not by any means such a case.

MACAULAY, J.—The rule on the subject of admissions, when made evidence in civil suits, especially in relation to accounts, will be found in the books and cases following, which fully support the views I always entertained on the subject, irrespective of the new rule in relation to payments credited in the plaintiff's particulars:—2 Atk. 252; 2 Vern. 276; Eq. Ca. Abr. 10; 1 East, 461; 2 Stark. Ev. 48; 3 Stark. Ev. 1059, 1348; 5 Taunt. 245; R. & M. 257; 2 B. & P. 548; Roscoe, Ev. 50, 56; Saund. Plg. 700; 1 M. & W. 66; 2 Bing. N. S. 145; 1 A. & E., N. S. 403; 1 Vent. 171.

The new rule on the subject of payments credited in the particulars was adopted, in consequence of differences of opinion in the courts at Westminster, touching the necessity of pleading payment in such cases—Coates v. Stevens, 2 C. M. & R. 118; 5 Tyr. 764; Ernest v. Brown, 3 Bing. N. S. 674; Kenyon v. Wakes, 2 M. & W. 764; Nicholl v. Williams, 2 M. & W. 758; and the cases to a late period are all noticed in a very good article in the Upper Canada Jurist for March, 1845, page 297.

It is said by Patterson, J., in Morris v. Jones, 1 Q. B. 397, that a plea of payment is no longer allowed when the payment intended to be pleaded is admitted in the particulars, although the rule does not say that the defendant shall not plead payment in such cases, and several tests have been suggested to illustrate the force and effect of such credits on the trial of the cause.

12 M. & W. 545, Smethurst v. Taylor, per Alderson, B.—“It is in-



"effect the same as if the defendant had pleaded payment, and there had been the admission of that payment on the record."

1 Q. B. 406, Rowland v. Blaksley, Lord Denman—"When these payments are admitted, it is as if so much were out of the record."

12 Law Jl. C.P. 32, Goatley v. Herring, Maule, J., puts it upon the footing of a plea of payment, and no evidence of it except the particulars, "saying it is just as if the plaintiff had said, I claim 30*l.*, but you have paid me 10*l.*"

6 M. & W. 13, Eastwick v. Harman, Alderson, B.—"It is clear from the particulars that the plaintiff goes for a *balance*. The particulars put you in the same position as if the defendant had paid money into court, and the plaintiff had gone on for more."

13 M. & W. 374, Townson v. Jackson, Pollock, C. B.—"Still it must be a question for the jury to say, whether upon the whole a balance exists between the parties."

The application of the rule was new to me at *nisi prius*, being the first time I have had occasion to act upon it, and certainly what I then supposed must be its true effect, is precisely what Maule, J., is reported to have said in Goatley v. Herring.

It is consistent with the rule of evidence as previously understood and applied, with the apparent object of the rule itself, and with the terms in which it is expressed; but consistently with such view the defendant should be at liberty to plead payment, and rely exclusively upon proof in support thereof *aliunde*, for it is unreasonable to compel him to adopt the credits in the particulars, if it be to his prejudice by helping the plaintiff's case, any more than independent proof would help it.

The cases do not afford any general guide, the most of them relating to peculiar circumstances, in relation to which several illustrations are suggested, but no uniform test given.

Payments credited in the particulars obviate the necessity of a plea of payment, but cannot be strictly assimilated to a declaration admitting part payment, and claiming a balance only, for the declaration embraces the whole demand, and the credit of payment is collateral, nor to a plea of payment admitted by *nolle prosequi*, or proved by defendant, for neither is spontaneous on the plaintiff's part, and in the one it is in fact denied. Nor is it as if so much was struck out of the declaration, for being for the defendant's benefit, the plaintiff is only liable to be restrained by the defendant in relation to his demand, and the payments are only made available at his election. It is in effect very much like a plea of payment *ore tenus* at the trial, admitted by the plaintiff, or like a spontaneous admission thereof by the plaintiff at the close of his case, and accepted by the defendant, in both of which cases of course the payments so admitted would relate to, and be received in reduction of the plaintiff's claim as then in evidence.

The result in my impression therefore is, that a bill of particulars containing credits of payments, admissible without a plea of payment, is not now, when adopted by the defendant in lieu of a plea of payment proved, to go to the jury as a mere admission of the plaintiff, and as such to be taken altogether, and constituting or made evidence for the plaintiff in favour of his demand, according to the usual rule on this



head, but to be treated as an admission for the purposes of the suit, to dispense with a plea of payment in relation thereto, to be adopted by the defendant or not at his election, and if adopted at the trial, the whole bill of particulars to be no further in evidence than to shew a reference to what demands the payments are credited, for the purpose of application or explanation, but having necessarily this effect, that to whatever demand the defendant applies them, such demand is so far admitted, and the payments thenceforth appropriated thereto. Of course, consistently with this rule, the plaintiff must in the first place prove his demand, and the defendant may rely exclusively on a plea denying its existence if not sufficiently proved; or the defendant may in the first place, resisting the demand, afterwards refer to the credits given to be applied against it, if such demand should be established to the satisfaction of the jury. But I do not see that such credits can be laid before the jury upon a supposition purely hypothetical, namely, to be applied so far as they may go to any demand the plaintiff may establish irrespective thereof.

The whole evidence on both sides must be received during the trial, and go to the jury together.

The defendant may rely upon payments or not at his election, and it must be for him to say whether he will treat the credits as a plea of payment proved or admitted, or as so much confessedly thrown out of the declaration or not, and having made such election, if he adopts the credits, the bill of particulars must then be laid before the jury on defendant's behalf, subject to whatever effect his availing himself of the payments credited, (so far as may be necessary to meet thereby any demand established by the plaintiff) may have upon the whole case as already in evidence.

To recover under such circumstances the plaintiff would only go for, and could only recover by proving a balance. But as said by Maule, J., in *Goatley v. Herring*, "it is as if the plaintiff said, I claim 30*l.*, but you "have paid me 10*l.*," and as the Lord Chief Baron said in the last case on the subject, (13 M. & W. 374,) it must still be a question for the jury to say, whether upon the whole a balance exists between the parties.

In the case now before us, I may have left the whole bill to the jury, with liberty to give more weight to it in the plaintiff's favour than some of the cases warrant, still the degree of weight to be attached to it, if any beyond the mere admission of payments was left entirely to them, and that they were entitled to attach some weight to it, being laid before them to shew the credits, I still think, considering the circumstances of the case, under the plaintiff's particulars, and the evidence on both sides previously received on the trial of the cause.

The jury have found a balance due the plaintiff, but a balance only; and such balance is much less than the plaintiff's particulars demanded, shewing that they did not adopt the particulars in toto.

With the verdict I am satisfied, and think it warranted by the evidence regardless of the particulars. Indeed the case was going to the jury without notice of them, until my attention was drawn to them by the defendant's counsel at the close of my charge, in proof of payments to the extent credited, so far as might be necessary to meet any thing found to be established in favour of the plaintiff.

JONES, J., and McLEAN, J., concurred.

*Per Cur.*—Rule discharged.

## MCLEAN v. KNOX.

Where there have been several writs of *ca. re.* sued out, and the last served, the plaintiff (with reference to a plea of payment, or the Statute of Limitations), in order to give himself the advantage of having the action considered as being commenced by the first writ, must shew at the trial that the first writ *was returned*.

*Semble*, that the continuance between the intermediate writs may be entered at any time.

Assumpsit. The plaintiff sued the defendant for wages, as master of a schooner.

The defendant pleaded, 1st, General issue.

2ndly, That before the commencement of the suit, he paid to the plaintiff "all the monies in the declaration mentioned, in full satisfaction and discharge of all the causes and rights of action in the declaration mentioned."

The plaintiff replied, that "the defendant did not pay the said money in such satisfaction and discharge as is in the said plea stated."

It appeared, on the trial, that the action was commenced by a *ca. re.*, not bailable, sued out on the 26th January, 1846, but not served; and that an *alias* writ issued, and a *pluries*, which last was served on the defendant on the 27th July, 1846.

On the 19th February the defendant paid the plaintiff a sum of money in full discharge of the debt, and took a receipt in full from him of all demands to that date.

The first entry of a date on the record was of 12th September, 1846, the day of filing the declaration.

The learned judge, at the trial, considered that the defendant was entitled to a verdict upon the second issue, but reserved leave to the plaintiff to move to enter a verdict for nominal damages, if the court should be of opinion that he was entitled in strictness to succeed upon that issue.

The plaintiff relied upon the point that his action must be looked upon as being commenced on 36th January, 1846, when his first writ was sued out; and therefore that the money, not being paid till July following, was not paid before action brought, and could not bar his right to recover for the costs, so far as his proceedings had gone.

The defendant, on his part, insisted that the several writs not being shown to have been returned, and regularly connected by continuance, the action could not be treated as being commenced before the last writ was taken out, which was served on the 27th July; and so that payment was made, as pleaded, before action brought.

With regard to the writs, all that appeared on the trial was, that the first issued on the 26th January, and was returned on the 10th February "*non est inventus*." In respect to the *alias*, nothing was shewn.

Archibald McLean moved, pursuant to leave reserved, to enter a verdict for nominal damages, and relied upon 5 B. & Ald. 886; 1 Bing. 502, N. C.

A. Gorham shewed cause. He cited 6 T. R. 617; 7 Mod. 3; 2 Ld. Ray'd, 883.

ROBINSON, C. J., delivered the judgment of the court.

We must consider what the issue is. The plea says nothing of damages; but only, "that before commencement of this suit, the defen-

"dant paid to the plaintiff all the monies in the declaration mentioned  
"in full satisfaction and discharge of all the causes and rights of action  
"in the declaration mentioned."

Now by this plea he undertakes to prove, that before action brought, he paid all the monies claimed in the declaration, in full satisfaction and discharge of the causes and rights of action mentioned therein.

The plaintiff does not deny that the defendant paid the money, or that he paid it before action brought; but says he did not pay the said money in *such satisfaction and discharge* as is in the said plea stated.

That plea however, as I take it, puts in issue the payment being before action brought, and also payment in discharge of all causes of action in the declaration.

Then 1st, as to payment before action brought :

I think that, for the purpose of this plea, as well as with reference to the Statute of Limitations, when there have been several writs of *ca. re.* sued out, and the last served, the plaintiff must shew, on the trial, that the first writ was returned, in order to give him the advantage of having the action considered as being commenced by the first writ. And it is held that that is all that need be done; for that the continuance may be entered at any time, and that there is no necessity for taking out any intermediate writ.

Now here, the first writ was shewn to have been returned, and it can therefore be connected by continuance with the process served. The return of the first writ puts the court in possession of the cause. The suit was then commenced, according to our second rule of Easter Term, 5 Vic.; and the case of *Beardmore v. Rottenburg*, 5 B. & Ad. 452, we think, fully supports the motion to enter a verdict for the plaintiff with nominal damages on this issue.

*Per Cur.*—Rule absolute.

# JORDAN V. MARR.

The plaintiff declares, *in the District Court, in assumpsit*, upon three counts: 1st, upon a special agreement for *twenty-five pounds*; 2nd, work and labour, *twenty-five pounds*; 3rd, account stated, *twenty-five pounds*; and concludes, "and thereupon the defendant, in consideration of the premises respectively, "promised to pay the said several sums of money respectively to the plaintiff; yet he hath not paid any of the said monies, or any part thereof, to "the plaintiff's damage of *forty-nine pounds*," &c. The defendant pleads to the merits, and the plaintiff has a verdict for *twenty-seven pounds*.

*Held, per cur.*, upon a motion in arrest of judgment, that though upon the face of the declaration, the aggregate amount of the sums claimed in the three counts exceeds the jurisdiction of the District Court, the court is not therefore necessarily ousted of its jurisdiction.

*Semble.*—It might have been otherwise, if the defendant had pleaded to the jurisdiction.

*Held also*, that the statement of damage to *forty-nine pounds*, without an averment that the claim was liquidated by the signature of the defendant, is sufficient after verdict.

*Held also*, that though the verdict was for *twenty-seven pounds* upon an unliquidated claim, the plaintiff might still retain his verdict by remitting the 2l. the excess of jurisdiction.

*Held also*, that the constant course of proceeding under the District Court Acts is very material to be considered by the court, where there has been no actual excess of jurisdiction.



*Semble*, that if the action had been *debt*, instead of *assumpsit*, the judgment might have been arrested.

*Semble also*, that the judge may amend a verdict, with the assent of the jury, at any time before they are discharged.

(MACAULAY, J., *dissentiente* on the three principal grounds of objection.)

Appeal from the District Court.

On this appeal from the District Court, the defendant contended that he ought to have succeeded in that court, on a motion made by him for a new trial, or to arrest the judgment.

The objections on which the defendant moved were, 1st, that the declaration shewed on the face of it a cause of action beyond the jurisdiction of the District Court.

2nd, That the verdict was in fact given for a greater amount than the District Court can give judgment for, upon a cause of action such as the plaintiff recovered upon.

On the first point, The declaration was *in assumpsit*. The first count was on a special agreement, and stated that, in consideration that the plaintiff had done work for the defendant to a large amount, to wit, to the value of 25*l*. the defendant agreed to let him take a crop of wheat from the fields of the defendant; and that he refused afterwards to let the plaintiff reap the crop.

In this count there was no allegation showing what amount the plaintiff claimed to recover under it, any further than his statement that the value of his labour given as a consideration was 25*l*., not precisely, but under a *videlicet*. The plaintiff then, in another count, claimed 25*l*. for work and labour done for the defendant, and 25*l*. on an account stated between them; and then concluded, "and thereupon the defendant, in consideration of the premises respectively, promised to pay the said several sums of money respectively to the plaintiff; yet he hath not paid any of the said monies, or any part thereof, to the plaintiff's damage of *forty-nine pounds*; and therefore he brings his suit."

The defendant pleaded, 1st, the general issue.

2nd, That before the commencement of the suit, he had delivered to the plaintiff certain goods and chattels of great value, viz., 50*l*., in satisfaction of all the sums of money in the declaration mentioned, and of all damage, &c., which the defendant accepted, &c.

3rd, That he delivered to the plaintiff a promissory note for 26*l*. 5*s*., in full satisfaction, &c.

4th, A set-off of 50*l*. for goods sold, 10*l*. for work done, and 50*l*. due on an account stated.

Issue was joined on these pleas, and at the trial the plaintiff claimed damage for the non-performance of the following agreement, and made no other demand:

"Pickering, October 18th, 1843.

"I give up to Thomas Jordan, or bearer, eight acres of wheat, three acres of fall wheat, and five acres of spring wheat; and I am to seed and sow the five acres in spring, 1844, when Thomas Jordan wants me to sow it."

(Signed)

"William Marr."

He proved that though the defendant had in the spring wheat according to his agreement, yet he would not let him harvest either of the



fields. The contest between them was respecting an alleged settlement. They had had other transactions; and while the wheat was in the ground, the defendant, on paying up some wholly different demand which the plaintiff had against him, took from him a receipt in full for all demands.

He relied on this receipt to bar any claim under this agreement, pretending that the settlement included it.

The plaintiff maintained that their settlement had no reference to it, and that it was fraudulent to attempt to make that use of the receipt. The evidence turned wholly on that point.

The learned judge told the jury that the case depended upon the question of fact whether the crops were included in the settlement or not; that if they were satisfied they had not been included, the plaintiff was then entitled to recover such compensation as they might think the eight acres of wheat worth.

No evidence was given of the precise value of the wheat, and the jury being left to judge of that from the description given of the fields and of the crops while growing, found a verdict for the plaintiff, and 27*l.* damages.

After this verdict had been rendered, that is, immediately on its being endorsed on the record, and signed by the judge, the defendant's counsel objected that it was for a sum beyond the jurisdiction of the court. He did not object till after it had been recorded, possibly from the conviction that if he had done so, the jury would have been instructed that the plaintiff desired no more than 25*l.*, and could not legally recover more in that court, which would have led to the correction of the error.

In the following term, the defendant made the amount of the verdict a ground of objection to any further proceeding being had in the cause; contending that the judgment must be arrested for that cause, if not for the want of jurisdiction apparent on the face of the declaration. He moved also for a new trial upon the grounds already stated. This rule was discharged, and thereupon the defendant appealed.

*John Duggan*, for the appellant.

*John Bell*, for the respondent

The argument of counsel fully appears in the judgment of the court.

ROBINSON, C. J.—With respect to the manner in which the application for a new trial was disposed of, I do not think that it was against law or evidence that the plaintiff should recover, (waiving at present the question of jurisdiction), and we do not overrule the decision of the judge upon the ground of the alleged surprise as stated in the affidavits; a good deal must be left in such cases to the discretion of the court, and we find no fault with the manner in which the discretion was exercised in this instance.

The questions raised on the point of jurisdiction are important, on account of their general application.

The last District Court Act, 8 Vic. ch. 13, which repeals all former Acts respecting the District Courts, is the foundation on which the jurisdiction of these courts now rests. It enacts, (sec. 5), "that the said courts respectively shall hold plea of all causes or suits, relating to debt, covenant, or contract, to the amount of £25; and in cases of contract or debt on the common counts, where the amount is ascertained by the signature of the defendant, to £50; and also, in all

"matters of tort relating to personal chattels, where the damages shall not exceed £20, and where titles to lands shall not be brought in question."

The courts are made expressly by this statute "courts of law and of record," and it enacts that judges shall be appointed by commission under the great seal of the Province. By clause 11, the mode of pleading in this court, and the mode of entering and transcribing pleadings, are directed to be the same as in the Court of Queen's Bench under the new rules, which correspond in most respects with the new rules of pleading in England.

The 43rd clause enacts, "that the several district courts may set aside verdicts or nonsuits and grant new trials, and hear and in their discretion grant motions in arrest of judgment, *in all cases within their jurisdiction*, upon the like principles and grounds as prevail in the Court of Queen's Bench upon similar applications."

The 51st clause provides, "that in any action depending in the Court of Queen's Bench for any debt or demand, in which the sum sought to be *recovered* and *endorsed on the copy of the original process served* in such action shall not exceed £25; and in any action in the Queen's Bench for any debt or demand in which the amount shall be ascertained by the signature of the defendant, the issues may be tried before the judge of the district court, upon a writ of trial to be issued from the Queen's Bench."

I cite this clause, because it tends to shew what the legislature regarded, while they were passing this act, was the amount for which the action is really brought, rather than doubtful inferences to be raised merely from a multiplicity of counts upon the record.

They take therefore as their criterion the sum sought to be recovered, not according to the counts in the declaration, which are in a measure fictitious, but the sum which the plaintiff claims by his endorsement on the copy of the original process.

The 57th clause enacts, "that if either party in a suit in the district court shall be dissatisfied with the decision of the judge, upon any point of law arising upon the pleadings or with the charge to the jury, or the decision upon any motion for a nonsuit, *or for a new trial or in arrest of judgment*, it shall be lawful for such party (upon giving security as directed by the act), to require the judge to certify the pleadings, motions, rules or orders granted or made in the cause, with his judgment or decision thereon, and the evidence and all exceptions and objections thereto, whereupon the same matter shall be set down for argument at the next term of the Court of Queen's Bench, which court shall give such order or direction to the court below, touching the judgment to be given in such matter, *as the law of the land shall require*, and shall award costs to either party in their discretion, and upon receipt of such order, direction, and certificate, the judge of the district court shall forthwith proceed in accordance therewith."

The 59th clause provides, "that in any suit to be brought in the Court of Queen's Bench, which suit may be of the proper competence of the district courts, no more costs shall be taxed against the defendant than would have been incurred in the district court in carrying on the same action, unless the judge who presides at the trial of such action

"shall certify in open court immediately after the verdict is recorded, that it was a fit cause to be withdrawn from the District Court, and to be commenced in the Court of Queen's Bench," &c. &c.

The 72nd clause continues the commissions of the judges of the several district courts, notwithstanding the repeal of all former statutes respecting the courts, and declares "that nothing in this act shall extend to make the district courts thus continued new courts, but that they shall be taken to be the same courts to all intents and purposes, as if they had continued to be held under the repealed acts."

The district courts were first established by our statute 34 Geo. III. ch. 3, which defined their jurisdiction thus: "That there be constituted in each district a court, *which shall have cognizance in all actions of contract for sums above forty shillings, not exceeding the sum of 15l., to be known by the style of the District Court, and to be holden by one or more judges to be appointed by commission under the great seal of the Province.*"

The statute 37 Geo. III. ch. 6, extended the jurisdiction to the sum of *forty pounds* "in such actions of contract only as relate to mere matters of debt, and are brought for the sole purpose of recovering some sum or sums of money the amount of which is already liquidated or ascertained, either by the nature of the transaction itself, or by the act of the parties, and not for any other purpose or intent whatever."

That act also enabled these courts to take "cognizance of all questions of property in personal chattels, where the value of the thing claimed did not exceed 15l., and to award damages to the like amount in all matters of trespass where the title to land should not come in question, and not affecting future rights."

The statute 2 Geo. IV. ch. 2, repealed all former acts respecting the district courts, consolidating their provisions in one act, with some amendments. It repeated the provision that the judges of the courts were to be appointed under the great seal, and enacted that they "*shall hold plea in all matters of contract from 40s. to 15l., and where the amount is liquidated or ascertained either by the act of the parties or the nature of the transaction, to 40l., and in all matters of tort respecting personal chattels where the damages to be recovered shall not exceed 15l.; and the titles to the lands shall not thereby be brought into question.*"

I have cited these provisions from the former acts, not because they have any direct bearing on the question since their repeal, but because, being passed *in pari materiâ*, they may serve to throw light on each other, and assist us in determining what the legislature must be supposed to have intended.

At the same time, I must say that it appears to me, that though there have been changes in the extent of jurisdiction, the effect of the language used for limiting the jurisdiction is, in other respects, the same in all.

"Shall hold plea of all causes relating to debt, covenant or contract, to the amount of 25l." (2 Geo. IV. ch. 2; 8 Vic. ch. 13); or, shall "*have cognizance in all actions of contract for sums above 40s. and not exceeding 15l.*" (34 Geo. III. ch. 3); or, shall "*have jurisdiction to the sum of 40l. in such actions of contract only as relate to mere matters*



of debt, &c." (37 Geo. III. ch. 6), are all forms of expression having the same degree of stringency as respects the limiting of the jurisdiction.

I have considered whether the 34 Geo. III. ch. 3, giving cognizance in all actions of contract, for sums above 40s., and not exceeding 15*l.*, might not have been taken to mean, not that the action must be for a sum not exceeding 15*l.*, but that *each contract* must be for a sum not exceeding 15*l.*, connecting the word "for" with "contract," rather than with "action." This difference of construction could have had no effect while that act was in force, unless it could be taken to allow of recovering for an unlimited aggregate amount, upon several contracts sued upon in one action, provided no one of such contracts was for a larger sum than 15*l.*

But the statute, so far as I know, never received such a construction, and I have no idea that it was ever intended to be so understood.

The meaning of the legislature, I think, in all these acts was, that no person should recover judgment in the district court for a sum larger than the amount limited by the acts respectively; 40*l.* being the largest sum, under any circumstances, up to the passing of the 8 Vic. ch. 13, and 50*l.* being now the utmost limit of jurisdiction under that act. And if they meant that the plaintiff should not recover more than the sum limited, of course they meant that he should not sue for more.

The defendant then, in the case before us, objects, 1st, that the declaration shews the plaintiff to be suing for an amount beyond the jurisdiction; because it sets out demands apparently beyond 50*l.*, the utmost limit, without showing the amount to be ascertained by the signature of the party, which is necessary to give the larger jurisdiction, and which should therefore appear upon the record.

2ndly. That if we can look beyond the record (which is denied), still the fact is, that the verdict has been rendered for 27*l.*, being for a demand above 25*l.*, on a cause of action which, as the evidence shews, was not of any limited amount ascertained by the signature of the defendant, but which went before the jury as the ground of a claim to unliquidated damages arising from the breach of an executory contract.

The learned judge whose jurisdiction was excepted against, certainly appears to have given his most careful attention to the question; but he seems to have felt the difficulty to be less than I think it is. Formerly there was a very tight rein held over these inferior jurisdictions, and probably from a better motive than the desire, which no doubt had some influence, to guard against encroachments on the jurisdiction of the higher courts. Some cases which are collected in Bacon's Abridgment, Court D., Comyn Dig. County, C. 8, are more rigorous than the late decisions in exacting that everything necessary to give jurisdiction should appear upon the record. *Moravia v. Sloper*, Willes, 30; *Titley v. Foxall*, Willes, 688; *Rowland v. Veale*, Cowper, 20, and many other decisions, place the doctrine on a more reasonable footing in this respect.

At the present day, the disposition of the courts is to give full effect to the intention of the legislature in establishing these inferior jurisdictions, and public policy certainly requires this.

With regard to the district courts in this province, too, it is to be considered, that though they are indubitably in the class of inferior courts, having but a limited jurisdiction in point of amount and locality, yet



they are courts of record expressly made such by the legislature; they are courts also which are bound to proceed according to the course of the common law; the judges are barristers, holding their commissions under the great seal; and all issues in fact are tried, as in this court, by a jury.

These are all reasons why we may suppose that the legislature designed every reasonable intendment to lie in favour of their jurisdiction, and they warrant us in extending to them the most liberal construction which can be applied to their proceedings, consistently with sound legal principles.

But the objection here, is not that the plaintiff has failed to shew in his declaration all that is necessary to sustain the jurisdiction; but the argument is, that it does appear upon the face of his declaration that he is suing for a demand beyond the jurisdiction of the court. If that does certainly appear, it must follow no doubt that the whole case is *coram non judice*; that is a consequence which must be admitted to follow as well now as at an earlier period of our law; for where the legislature has clearly marked out the line within which a new jurisdiction is to act, it cannot be otherwise but that its proceedings, whenever it goes beyond that line, must be looked upon as wholly unauthorised and void.

The late case in the Common Pleas of Dempster et al. v. Purnell, 1 Dowl. N. S. 168, to which we were referred, is very clear on that point, and it is a case strongly resembling the present.

The plaintiff there had sued in the County Court of Somerset, in debt, claiming 1*l.* 19*s.* 6*d.* for goods sold and delivered, and 1*l.* 19*s.* 6*d.* as being due upon an account stated. The declaration was framed much as it would be in a superior court, speaking of the sums as severally due, and treating them as distinct demands, not however alleging expressly that they were *further* or other sums, and concluding, "whereby an action hath accrued to the plaintiffs to demand and have of the defendant the said several sums respectively amounting to the sum of 1*l.* 19*s.* 6*d.*; yet the defendant hath not paid the said sum above demanded, or any part thereof, to the damage of the plaintiffs of 1*l.* 19*s.* 6*d.*, and therefore they bring suit, &c."

The defendant in the County Court pleaded to the jurisdiction, maintaining that the plaintiff by his declaration was demanding more than 40*s.*, which was the amount to which the jurisdiction was limited; and the court gave judgment in favour of the plea, which judgment was reviewed in the Common Pleas, on a writ of false judgment, the inferior court not being one of record. It was held, that though the declaration was not consistent throughout, the said sum only being spoken of in the breach, when more than one sum had been stated to be due, and the damage being laid at 1*l.* 19*s.* 6*d.*; yet that it could not be denied that the plaintiffs did in their declaration demand two several debts of 1*l.* 19*s.* 6*d.* each, on different accounts, and as distinct debts.

The plaintiffs had, by a bill of particulars delivered and filed with their declaration, demanded 1*l.* 18*s.* 8*d.*, being the balance of an account of 3*l.* 11*s.* 6*d.*; but the court held that they could not look at the particulars as part of the declaration; and the question arising strictly upon the pleading returned by the sheriff to the court, they said they could not import into their judgment anything contained in the particulars. They agreed that if the bill of particulars could be brought in to aid

the declaration, it would appear that the plaintiffs had not brought their action for more than 40s. But giving no effect to the particulars as limiting the claim, and looking at the terms of the declaration, which was all that the plea to the jurisdiction brought before them, they said they could view it in no other light than as a declaration claiming the whole sum of 3*l.* 19*s.*, composed of the two amounts sought to be recovered in respect of the goods sold and delivered, and the account stated. "If that be so (COLERIDGE J. said), the County Court cannot be said to have jurisdiction in the case; and the issue in law being "joined, it was the duty of the court not to take further cognizance of "the suit, and to have given judgment to that effect."

The County Court had supported the plea against the jurisdiction, and had given judgment in the defendant's favour, but erroneously awarded to him the costs of his defence, which judgment the Court of Common Pleas held was a mere nullity; for that on the face of the declaration the plaintiffs were out of court; and they gave judgment simply that the plaintiffs should be barred from further proceeding in the County Court.

Then, trying the declaration in the case before us by the standard of that in *Dempster et al. v. Purnell*, there is as much ground for holding that the counts here are each for separate demands. The second and third counts state claims of 25*l.* each, amounting between them to 50*l.*, the utmost limit of jurisdiction; and besides these, the plaintiff claims, in the first count, substantial damages for breach of a special contract, which is apparently as distinct from the demands in the other counts as the demands in *Dempster v. Purnell* were distinct from each other.

No precise sum is claimed as damages in that count; but if it must be regarded as setting up a claim for anything, it must be a claim for something beyond the 50*l.* claimed by the other counts, upon the principle upon which *Dempster et al. v. Purnell* was decided; and there is this difference, which makes against the plaintiff in the present case, that the 50*l.* claimed by the other counts is not shown to be composed of demands either wholly or in part ascertained by the signature of the defendant. Without that, the jurisdiction of the District Court extends only to 25*l.*; and it is contended that the case cannot be assumed to be within the larger jurisdiction, when the declaration contains no averment of the amount being ascertained by the defendant's signature.

On the other hand, there is this difference in the plaintiff's favour between the cases, that the question is not here presented in the strict form of a plea to the jurisdiction, which necessarily confines the court to the matters on the face of the pleadings; but the defendant having submitted in the first instance to the jurisdiction, there has been a trial on the merits, and we see what the plaintiff did in fact claim, and what the court did in fact give. And in the next place, this action is *in assumpsit*, not debt.

In *Dempster v. Purnell*, the plaintiff could consistently with his declaration have judgment for both the debts declared on, in addition to whatever damages the court might think it right to give for detaining those debts. He must therefore be looked upon as claiming by his declaration the debts, at least, and damages for detaining them to be added to these debts.

In this action he claims only damages for the non-performance of certain promises, and limits his demand on account of all to 49*l.*

All that he could recover in this form of action is in the shape of damages; and when he concludes by laying his damages at 49*l.*, he limits his demand to that. In *Dempster v. Purnell* it was otherwise.

I must confess however, notwithstanding these differences, if we were clearly forced to take up the case as it stands on the declaration merely, and to determine it in accordance with *Dempster v. Purnell*, which is not opposed to antecedent authorities in England, I think we could not hold otherwise than that the plaintiff would appear by his declaration to be *coram non judice*; because, in the first place, though he limits his damages to 49*l.*, he shews that he desires to bring before the court, as grounds of claim, matters of contract to a greater amount in all than 50*l.* He shews this in point of form at least, and does not shew the contrary clearly in point of substance; and in the next place, he is at any rate actually claiming by his declaration 49*l.*, and for all that appears in his declaration, on an unliquidated demand.

But we are bound to consider that in this case, instead of the defendant having pleaded to the jurisdiction, and so prayed judgment upon the question as it stood in the declaration alone, he has pleaded to the action, and gone to trial upon the merits, and has afterwards submitted so far to the jurisdiction as to move in the District Court for a new trial, upon some grounds quite distinct from any denial of the authority of the court, and implying, on the contrary, a submission to it, by invoking the exercise of its discretion in awarding a new trial upon the evidence and on affidavits.

That submission of his cannot confer jurisdiction, if we must admit the case to be one, in fact, of which the district courts could not legally take cognizance, as being beyond their limits; but the effect of it is to open to us the true state of the case; for we have now under our view, not the declaration only, but the evidence and verdict, and all that has been done in the cause, brought before us for revision, under the 57th sec. of the 8th Vic. ch. 13, which directs that upon any judgment or decision of a district court, brought before us by appeal, we are to give such direction to the court below, touching the judgment to be given in such matter, *as the law of the land shall require*.

*The law of the land* means of course the law of Upper Canada, and the question which in my opinion we have to determine is this, Is it consistent with the law, as it has been administered in Upper Canada, by our predecessors and ourselves, that we should hold the case to be out of the jurisdiction of the District Court, 1st, by reason merely of the manner in which the plaintiff has stated his case in his declaration, or, 2ndly, by reason of the verdict?

The reasoning of the Court of King's Bench in *Buggin v. Bennett*, Burr. 2037, applies with much force here, and would indeed be decisive, if we can hold that the want of jurisdiction does not *necessarily* and *conclusively* appear on the face of the declaration.

After the party has submitted to the jurisdiction, it is not enough for him to say, in a late stage of the proceedings, that something exists which will shew a want of jurisdiction, or that enough does not appear in the pleadings to shew conclusively a jurisdiction. He must, as I conceive, shew that the want of jurisdiction does appear, and that conclusively.



Now as to the 49*l.* damages claimed, clearly the plaintiff is suing for that sum; then does the declaration shew for all purposes, and as well after the verdict as before, that the district court could have no jurisdiction to hear and determine his claim for that amount? He could go into the court with such a demand, if he could shew it to be ascertained by the signature of the defendant. He has not averred that the amount of his demand has been so ascertained, nor does his declaration shew that it has not been, unless we must rigidly apply the maxim "*de non apparentibus et non existentibus, eadem est ratio*," and so hold that the demand is one over which the court had not jurisdiction, because the foundation of such a jurisdiction is not spread out on the record.

The analogy from the Statute of Frauds, I apprehend will not hold. It is clearly not necessary for a plaintiff under that statute to state that the defendant's contract was in writing, though it must be proved to be so, but the point as raised in this case goes beyond the evidence in the cause; it lies at the foundation of the jurisdiction, and I certainly am of opinion, that if this case were before us as a new question, soon after the constitution of these courts, we should find it necessary to hold that the plaintiff suing in assumpsit for 49*l.*, must shew his demand to be ascertained (as the statute expresses it) by the signature of the defendant, or at least on so much of it as would leave not more than 25*l.* to be investigated as an open account.

But in a long course of proceeding in the district courts, this has not (as we know) been usual. From 1797 to this time, the amount of jurisdiction has been dependent on the fact of the demand being liquidated by the defendant's signature, or (before the last act) by the nature of the transaction or the act of the parties, and yet that it had been so liquidated has not in general been averred, but has been usually left to be matter of evidence when the declaration was on the common counts.

I take this indeed to have been the constant practice. Our predecessors were visitors of the district courts by statute, up to the year 1822, nearly thirty years; since that time we have had their records before us occasionally on writs of error under our statute 5 Wm. IV. ch. 2, and more frequently since the new provisions respecting appeal have subjected all their proceedings to be reviewed in the Queen's Bench.

I believe I state what must be generally known to the profession, that the constant course in these courts has been to declare, as has been done here, on the common counts, claiming any sum within the highest limit of the court's jurisdiction, without stating that the amount claimed had been liquidated "by the signature of the defendant," or "by the nature of the transaction," or "by the act of the parties," all of which expressions have been used in one or other of the statutes.

Without yet deciding what ought to be the effect of this long and well known practice, and of the construction which the statutes have in that respect received under the view of this court, I will proceed to the other point raised, that the declaration must be necessarily looked upon as intended to claim a distinct sum on a distinct cause of action under each count. This I am also aware has in practice never been so understood from the foundation of these courts to the present time, and



if the judge who decided this case had arrested the judgment, upon the ground that each count was for a separate demand, and must of necessity be held to be so, without reference to the facts appearing on the trial, he would have determined in effect that all that has been done in these courts in thousands of actions, and for fifty years together, has been *coram non judice*: that the writs of execution have had no legal judgments to support them, that those who have enforced them have been trespassers, and that in all cases where lands have been sold upon such judgments, the title is worth nothing.

When I say thousands of cases, I have no doubt I am correct, for though all actions in the district court have not been for the larger sum and on the common counts, yet a vast proportion of them have been; and the ordinary form of declaring has been that pursued here, namely, laying causes of action on the common counts, each of an amount within the limit of the jurisdiction, but in their aggregate amount exceeding it, but taking care nevertheless to claim in conclusion such damages only as are within the jurisdiction of the court.

The causes of action so stated on the several common counts, are no doubt in appearance several demands, but the defendant knows very well that they are in general not intended to be so understood, and he treats them, when it suits his convenience, as being one and the same cause of action, and often answers them by a plea applying only to one demand, and expressly averring that the sums claimed in all are one and the same sum.

This method of pleading, it is true, has been held to be, strictly speaking, irregular, as amounting to the general issue, with regard to all the demands but one; but it has been adopted from an early period, and is still persisted in in England as well as here, on account of its convenience and its accordance with the truth, though pleaders know that it stands on ground very doubtful in point of form, and exposes them to the vexation of a special demurrer.

We have so far adopted the new rules of pleading in force in England, as to refuse to allow a plaintiff the costs of several counts, unless a distinct subject matter of complaint is intended to be established in respect of each; but we allow him the use of them, subject to his risk of losing the costs relating to them, and the count for money due on an account stated is expressly allowed to be joined with any other counts for a money demand, though it may not be intended to prove under it a distinct cause of action.

By the last statute these rules of pleading are made to apply to the district courts, and certainly it does seem inconsistent and unreasonable to profess to allow a plaintiff the privilege, often a very valuable and necessary one, of laying his action in various shapes in different counts, in order that his declaration may be in some shape supported by evidence, as it may be made to appear at the trial, if he is not to have this privilege without its being assumed against him, not merely without evidence, but against evidence, and after the truth is known, that he is claiming a new and distinct debt in each count, and then ruling as the consequence of that conclusion, that he is out of court, and can maintain none of his counts.

The courts in England have been always very studious to prevent

legal fictions from working manifest injustice. These various counts do no doubt profess to be for several demands, but it is well known that in general they are not so intended. They may support separate demands no doubt, but the court below was called upon in this case to determine that they must be for separate demands; such a decision would in effect preclude these courts of record, whose jurisdiction is considerable, and which try cases by jury according to the course of the common law, from entertaining actions in that shape which seems necessary for doing complete justice, and delivering the proceedings from embarrassment.

If such a decision must have been pronounced and sustained, it would have called for legislative interference, not merely to remove a great impediment in the way of district courts, but to prevent the possible consequence of an almost infinite number of judgments rendered from the year 1794 to this time, from being held to be absolutely void, and this not because there had been in reality any excess of jurisdiction, but only because form must be regarded before substance, and because the court, rejecting the evidence of the fact as it appeared on the trial, must presume that to have been intended in all cases which they are well aware is only intended in a few.

It was said by Lord Mansfield, in the case of *Colchester Corporation v. Searer*, 3 Burr. 1870, "without an express authority so strong as not to be gotten over, we ought not to determine a case so much against reason as that the parliament should be obliged to interfere to set it right." The same eminent judge, (*Rex v. Pitt*, 3 Burr. 1338), distinguished between such cases as this would be, and the mere reforming of an erroneous practice of however long standing. "Whenever a practice (his lordship remarked), which is wrong or unreasonable, has happened to be introduced for want of a sufficient advertence to the consequence of it, the best way is to set it right immediately as soon as the inconvenience is observed, *if former cases be not affected by the retrospect.*"

But here nearly the whole course of proceeding under a succession of statutes from the beginning of these courts, and for more than half a century, would be affected by the retrospect; for the greater part I fear of what they have been doing, must on the principle contended for be held to have been *coram non judice*, to the great injury and peril of many.

In the *Bewdly* case, 1 P. W. 207, a construction of an act of parliament contrary to the words of it was allowed, founded only upon seven years' practice.

In *Rex v. Thompson*, 2 T. R. 21, and *Jones v. Smart*, 1 T. R. 44, the court laid much stress, in a criminal case even, upon the construction which had been put on an act of parliament in a long course of precedents of convictions founded on it. If the conviction were to be quashed, it was urged that many convictions which had been made in a series of years past would be removed by *certiorari*, that they might be overturned on the same objection, and the several justices who have proceeded upon them would be liable to actions. Ashhurst, J., said, "if this were a new case, I should most undoubtedly be of opinion, that this conviction could not be supported; but as the precedents are usually in this form, and as the conviction in *Rex v. Hartly*, (which

"had been before the court) was similar to the present, it is better to support this conviction, than by quashing it to overturn all former precedents." Buller, J., says, "if the precedent had never been adopted, I should have been of opinion that the evidence should have been fully set forth; but after so many convictions have been made in the same form, it would be dangerous to quash the present." Grose, J., is even more strong in his language: "as the precedent in *Burn*, (though it seems to me a faulty one) has been recognized by this court, in the case of the *King v. Hartly*, I think it must be supported. It might be highly inconvenient to overturn it, and I should be sorry that any opinion of mine should shake the authority of an established precedent, since it is better for the subject that faulty precedents should not be shaken, than that the law should be uncertain."

In the *King v. The Inhabitants of Essex*, Lord Kenyon observed, "I am not driven nor will I ever resort to the maxim, *communis error facit jus*, but uniform and unbroken usage *facit jus*."

Of course all such grounds of judicial decision must be adopted with reference to the facts and nature of each case. In *Nares et al. v. Rowles*, 14 E. R. 510, Lord Ellenborough remarked, that "he should be very sorry to find it established in argument, that a public revenue of several millions had been wrongfully collected from the subject; but though that should be the consequence, yet, if it were established, the court would ill discharge their duty if they did not look that and every other consequence in the face, in pronouncing judgment on the question when brought before them, if they should find themselves bound to pronounce the bond to be a nullity."

His lordship sustained what had been done in that case, by holding that the words "in any act *to be passed*," used in a statute *passed* on the 11th August, would include an act passed on the 27th day of July, in the same year. It can hardly be doubted that his lordship, in adopting that construction, was a good deal influenced by what one of the other judges pointedly expressed, when he said, "that his mind revolted at any other construction, which would illegalize everything the legislature meant to do."

Acting in the spirit of these decisions, I am very clear that we ought not to set at nought the contemporaneous construction given to these statutes, and the long course of usage and practice under them.

I take it, that the construction which they constantly received is, in a case of this kind, binding upon us, and more especially as the result is most consistent with truth and justice, and leaves the practice on a footing the most convenient for suitors.

I have referred to the clause 8 Vic. ch. 13, which restrains actions brought in the Queen's Bench, where they appear to be such as might have been tried in the District Court. It is a provision the same in substance with that which had existed for many years before, under the statute 58 Geo. III. ch. 4. In carrying it into effect, the court has always, after the trial, looked to the verdict as the criterion for declaring whether the action might have been tried in the District Court or not, and not to the plaintiff's own statement of his case in the declaration.

In the case of *Gardiner v. Stoddart* we determined that point, where the plaintiff, in an action of covenant in this court, had recovered but 2*l*.



damages, and had omitted to obtain the judge's certificate at the trial, as pointed out by the statute, that the cause was a proper one to be brought in the King's Bench, we refused to allow full costs to be taxed for him, although he had chosen to lay the damages in his declaration at 500*l*.

In looking to the verdict, and not to the plaintiff's own statement of the case on the record, we adopted the principle of many English decisions; and there have been many more recent to the same effect.

Then it would seem but just that the rule should apply in the plaintiff's favour, as well as against him,—to this extent at least, that it should be left to appear upon the trial, rather than assumed against him on the record, whether he means to proceed, under each count, for an independent cause of action, or is merely advancing the same demand in different shapes, in the several counts.

In England, even under the new rules, we know that this is very frequently done, though a power is given to the court to prevent its being done unnecessarily, by striking out superfluous counts upon the application of the defendant.

In this country we have adopted the new rules of pleading, with a modification in this respect, thinking it better not absolutely to restrain the plaintiff from stating the same cause of action in different counts, as had always been the custom, but to subject him to the loss of his costs, in respect to any counts which shall appear upon the trial to have been needlessly inserted.

There is, therefore, the more reason here than there would now be in England, in entertaining the supposition that the plaintiff is most probably demanding but the one debt in the different counts; and we are supporting a presumption not inconsistent with probability, in assuming that that may be the case until the contrary appears upon the trial, especially when we find the plaintiff, as we always do in such cases, claiming in the conclusion of his declaration, not the aggregate of the sums stated in the several counts, but a sum much less than that, and such as the court may legally give him judgment for, if his evidence shall shew him entitled to it.

In the case before us, for instance, the damages are laid within the jurisdiction of the court. The first count is on an agreement to give the plaintiff certain growing crops of wheat, in recompense for work and labour already done for the defendant, to the amount of 25*l*. The second count is for work and labour, which we may readily conclude is for the same work and labour referred to as the consideration for the special agreement; and the third count is on an account stated, which is very rarely inserted except as subsidiary to the preceding counts.

Then, the evidence and all the proceedings being before us, we see that without doubt, nothing more was claimed than the one demand; and now that the legislature have by their last act provided that kind of jurisdiction in this court, in regard to actions in the District Courts, that all that has been done there in a cause may be brought under review here, and not the record alone seen, but the evidence given, and every motion and order connected with the trial, so that no necessity exists for a Court of Prohibition, but ready means exist of correcting an actual excess of jurisdiction in any stage,—we are not called upon, in



my opinion, to support the false appearance of all the counts being for separate demands, against what we know judicially to be the truth in this particular case, and against the construction which has been put upon the record in this respect since the foundation of the court.

We are not bound to create confusion, by overturning a settled practice of so long a standing, and compelling another less consistent with truth and justice.

If the plaintiff in this or any other case were, in the general conclusion of his declaration, to claim a debt or damages, as resulting from his previous statements, which exceeded the jurisdiction of the court, that would of course be conclusive against him, and would put him out of court; so also, if in the present case, he had shewn at the trial by the course of his evidence that he was attempting to establish several demands of 25*l.* each, amounting together to a sum which the court could not take cognizance of, the judge at the trial, we must suppose, would have refused to entertain them, and he would be confined to the proof of claims compatible with his declaration, and within the competence of the court to try.

If, upon a statement of causes of action within the jurisdiction, he had inadvertently, or otherwise, been allowed to recover for something out of or beyond it, the remedy would be by moving against the verdict in the District Court, and appealing to this court, if necessary, from the decision upon such motion.

Upon the whole, my opinion is, that if we were called upon to pronounce upon a proceeding in an inferior court, now first going into operation under such an act as 8 Vic. ch. 13, we ought to hold, that as the plaintiff might advance distinct claims under the several counts, we could not assume that he will not, and that it would be safer at all events to hold, in accordance with the case of *Dempster et al. v. Purnell*, that the counts are for separate demands; but as the consequence of so holding would be virtually to deny to the plaintiffs in some cases the convenience and advantage, often very important, of laying their claim before a jury, in different forms, I have little doubt, considering the nature and extent of the jurisdiction, that as soon as such a decision should be pronounced, it would be felt necessary to alter the law, and to allow plaintiffs to declare on the same principles as in the Queen's Bench, without putting themselves out of court by the double form of declaring.

This being so, I am of opinion that we may well sustain the practice which has obtained upon the footing of long usage, and that we ought not to overturn it.

This applies merely to the objection that the three counts together shew that the plaintiff is claiming more than he can legally sue for in the court.

With respect to the other objection, that the damages claimed are 49*l.*, a sum not within the jurisdiction, except in cases where the demand is ascertained by the signature of the defendant. If this were a new question, I should be inclined to hold that the declaration should shew a case within the extraordinary jurisdiction, where the plaintiff claims a debt or damages beyond the ordinary jurisdiction; but there is a good deal of ground, I think, afforded by the decision in *Rowland v. Veal*, Cowper, 20; and *Buggin v. Bennett*, 4 Burr. 2035, and other more re-

cent cases, for holding, that if, for all that is stated, the case may be within the jurisdiction of the court, it may be assumed to be so till the contrary appears, and that the plaintiff is to be looked upon as undertaking to give such evidence of a debt as will support the jurisdiction, though he does not set out the description of proof.

As the District Court acts, since 1797, have had that construction put upon their enactments, I decline to overturn the practice, upon my view of the law, by arresting the judgment (which we are never bound to do) upon such an objection.

We see that the plaintiff's only demand was upon a written agreement, signed by the defendant; but in this case the agreement could not extend the jurisdiction, because it ascertains no sum, but gives the plaintiff only a right to claim general damages in case of non-performance.

That gives rise to the third objection taken, namely, that the plaintiff at the trial shewed no claim of such a nature that he could by law recover more than 25*l.* upon it, and yet that he has a verdict for 27*l.*

Undoubtedly that must be wrong, because we see by the evidence returned that the 27*l.* was in fact given by the jury as a compensation in damages upon a single cause of action wholly unliquidated, and not, in the language of the present District Court Act, "ascertained by the signature of the defendant." This the plaintiff should have taken care to prevent; but the learned judge's attention was not called to it till after the verdict had been received and recorded. Still, it appears to me, that the occasion for this objection might have been prevented, so long as the jury remained impannelled, by their being instructed that they had given more damages than the plaintiff desired, and more than they could legally give upon a claim of that nature.

They would then, as we must suppose, have altered their verdict upon this consideration, by reducing it to 25*l.*, as I conceive they clearly could have done, before they were discharged, and other business proceeded in.

The learned judge, however, doubted whether he could properly call upon the jury to reconsider their verdict with that view, and allowed it to stand.

Taken in connection with the evidence, we see that it clearly cannot be upheld as it stands; for it was wholly given upon the agreement, and for unliquidated damages.

But the jury have not necessarily put the plaintiff out of court, by giving him too large a verdict; they reduce him to the necessity of going again to trial, to have the error corrected, unless we can allow him to cure it by remitting the excess, which I think we may.

If the plaintiff had been suing on a demand, ascertained by the signature of the party, for 45*l.*, and the jury choosing to give interest upon it, though it was not claimed, had given a verdict for 52*l.* or 57*l.*, I am of opinion, that we might allow the plaintiff to remit the excess, and take judgment for the remainder; otherwise, a plaintiff would be placed in a very unfair position by a mere accidental slip of the court or jury.

So also, if a chattel of his should be detained from him, for which he could sue in the District Court, in trover, and recover 20*l.* damages, and no more, if in such a case he should desire to recover more, and should sue in the Queen's Bench, and the jury should find the chattel of less

value than 20*l.*, he would most probably lose his costs, and receive no benefit, in effect, from his verdict. If, to avoid this, he should claim only 20*l.* as the value of his chattel, and sue in the District Court, then a jury, by giving him more than he demanded, would defeat his remedy in that court, unless he could overcome the difficulty by remitting the excess, as is done in this court whenever the jury gives inadvertently greater damages than the declaration claims.

I think the plaintiff may, in all cases, well cure the objection of this accidental overstepping of the jurisdiction by the jury, by remitting the excess, as is often done in our own court, when, by mistake, a jury has given damages beyond what the plaintiff demanded in his declaration. The cases cited, in which the courts in England have taken that course, when, on writs of trial confined to cases not exceeding 20*l.*, the verdict has been given for more, are, in my opinion, good authority for this course. —7 Jurist, 514, 929, 973.

On the whole, my opinion is, 1st, that considering the manner in which the district courts have from their foundation proceeded, and without question, where there has been no actual excess of jurisdiction, and where we see from the trial that the plaintiff has not advanced separate demands under his several counts, claiming in all more than he could legally sue for, we should not hold the case *coram non judice*, by inferring from the record, contrary to what we see to have been the truth, that he was necessarily claiming several distinct debts, exceeding in all the jurisdiction of the court, merely because the declaration, technically construed, imports that they are several demands; but that when the plaintiff, *in assumpsit*, claims as the result of all his statements only such damages as the court is competent to give, we should examine (after the trial) whether he went beyond this in his evidence or not, and be governed by that.

2ndly, That we should confirm, and not overturn, the long usage of leaving it to be shewn, by the evidence on the trial, that when the sum sued for is beyond the ordinary jurisdiction, there has been such a liquidation of the claim by act of the parties, or even by the defendant's signature, as will enable the plaintiff to recover a verdict for the higher sum, instead of enacting that the fact which is necessary to such recovery should be averred in the declaration, which I believe in fifty years' practice, under all the statutes, has not hitherto been done.

3rdly, That where, in a case like the present, the plaintiff has one special count, on which he could recover only 25*l.*, with common counts claiming other sums, and lays his damages at 49*l.*, or any sum beyond the 25*l.* and not exceeding 50*l.*, it should be assumed, till the contrary appears, that he is not claiming under the special count, as unliquidated damages, any sum beyond 25*l.*, to which the jurisdiction of the court over demands of that nature is limited; and that if he claims anything beyond that, it will be on some other cause of action which he has declared upon, and upon which he has a right, if his evidence is sufficient, to recover such further sum or sums as would make up the damages claimed. For, in practice, it has been assumed, that in actions of *assumpsit*, while the jurisdiction of the district courts was confined to 40*l.* upon liquidated demands, and upon unliquidated demands to 15*l.*, the plaintiff may be allowed to recover any sum not exceeding 40*l.*,



composed of demands which, taken severally, were all such as the court could take cognizance of; as, for instance, that he could recover upon three promisory notes, of 10*l.* each, and an unsettled account of 10*l.*, making together 40*l.* In other words, it has not been held necessary that, whenever the plaintiff recovered above 15*l.*, the whole of his demand must be in its nature a liquidated debt.

It is not only that the district courts have so construed the statutes, but this court has taken the same view of their jurisdiction, and has in consequence often refused to allow plaintiffs to tax Queen's Bench costs in such cases, where there had been no certificate moved for at the trial, under the statute 58 Geo. III. ch. 4, because we have held that it was competent to the plaintiff in these cases to sue in the District Court.

Besides frequent decisions to this effect by individual judges at chambers, I refer to the cases, in this court, of Washburn v. Langley, and Beattie et al. v. Cook.

It need hardly be said, that no length of practice could justify an actual excess of jurisdiction, or warrant this or any other court in refusing effect to a statute, according to its plain words and evident intention.

As, for instance, if we were told that in every case in the district courts since the first act passed, they had disregarded its provisions, and allowed plaintiffs to recover, or to sue for and bring before a jury, such demands as were beyond the jurisdiction, we could not, in deference to any such practice, refuse to confine the court within the limits of the statute, whenever it had been made appear to us that they had attempted to exceed it. If, for instance, this plaintiff had claimed above 25*l.* damages, upon a declaration containing only the special count which is now before us, we must have treated the action as *coram non judice*, as much as if he demanded in his whole declaration 100*l.* damages, or had sued in trespass for 50*l.* damages. If we were to decide otherwise, we should be actually extending the jurisdiction of the court by our judgment, which we clearly have no right to do.

But we may well, in my opinion, uphold, upon the footing of constant usage and construction of fifty years, a practice which has neither led to nor sanctioned any actual excess of jurisdiction, and does not contravene any express provision in the statutes.

The legislature have not declared that whenever a plaintiff sues upon several counts, in *assumpsit*, he shall be understood to be necessarily suing for several independent demands. The acts have been silent on that point; their provisions have not been departed from in substance or effect. The whole question is about a technical point of practice, which regards merely the mode of giving effect to the statute, and which involves no such question as whether the statute shall or shall not have effect. In the case of *The Queen against The Bailiff and Burgesses of Bewdley*, 1 P. Wm. 207, which I have cited, the Attorney-General, Sir Edward Northey, in supporting a practice with regard to criminal informations, which related to the award of *venire*, could not deny that it seemed inconsistent with the provisions of a statute (4 & 5 Anne) which had been passed six or seven years before; but he relied on the fact that the practice ever since the making of the act had been the same that he had here pursued, and that it had never been controverted; and he urged, what he said he had often heard Lord Hale observe on like



occasions, "That judges ought to have a great regard to practice "when the matter is not *res integra*, and where things have gone on that "course a great while without being broken in upon;" and he urged, if the resolution of the court should be contrary to the received practice, it would shake all the judgments that had been given on informations since the passing of the act.

The Chief Justice, Parker, declared that the court were *all* of opinion, that the clause of the statute in question might have extended to the crown, if the objection had come earlier; yet the constant practice ever since the making of the act having been otherwise, they refused to overturn it, saying that they did not think fit to break in upon an entire practice, and shake so many judgments upon a matter of so small moment.

Now, with reference to the case before us, it is certainly not a matter of small moment whether an inferior court, whose jurisdiction is limited by statute to a certain sum, shall exceed that jurisdiction or not; because, if they are allowed to do so, it would introduce confusion, and would be making a dead letter of the statute; but it is comparatively a small matter whether that practice shall be adhered to which treats all the common counts in a declaration as being necessarily intended to support different demands, though the inference is at variance with the known truth, or that practice which regards the sum which the plaintiff claims, in the conclusion of his statement of his cause of action, as the whole amount for which he is suing, and which leaves it to be ascertained upon trial whether the several counts are intended to be made use of for recovering several demands or not, and to what extent.

When the defendant, instead of pleading to the jurisdiction, submits to it, as in this case, and after the trial calls upon us to hold, in the face of the evidence before us, that the plaintiff must have been suing for 25*l.*, merely because all his counts, added together, amount to that sum, then, in my opinion, the principle established by the case of *Buggin v. Bennett*, 4 Burr. 2035, becomes entirely applicable, although that case came before the court on a motion for prohibition, and this comes before us in a different shape. Considering the relation which the 8 Vic. ch. 13 establishes between this court and the district courts, there can be no necessity for a writ of prohibition going to those courts, for a simpler remedy is in all cases open to the party.

But when we are appealed to, in the manner pointed out by the statute, to arrest or set aside proceedings in a case, on account of an alleged excess of jurisdiction, we are, in my opinion, to follow the principles laid down in the case of *Buggin v. Bennett*, and not to hold that the case has been *coram non judice*, merely upon the face of the record, unless it is *necessarily* so. And I think the practice is worthy of being upheld which has assumed a case not to be necessarily out of the jurisdiction of the court, merely upon the principle, false in fact, that every separate count must be advanced for the purpose of supporting a distinct additional demand, or that whenever a sum beyond 25*l.* is claimed, it must be upon an unliquidated demand, unless the contrary is stated.

Having, in this case, all that has been done and proved in the cause before us, we see that there has been in fact no excess of jurisdiction,

except by a slip of the jury in giving, upon evidence which only supported a count for unliquidated damages, 2*l.* more than the amount to which the court is limited—an error which can be cured by remitting the excess.

When I have spoken of what the constant practice has been, I spoke upon recollection of what I have seen again and again, of declarations and records of the district courts, both in this court and out of it.

It is notorious throughout the province, that while the summons and declaration were one paper, as they used to be, and also since the practice in that respect has been changed, the usage was common to have printed forms of declarations, containing a multitude of counts in *assumpsit*. which, if they had all been added together, would have exceeded the jurisdiction of the court, and the amount to which the plaintiff limited his claim expressly in the conclusion of his statement.

Two or three appeals from District Court decisions have been handed up to us within these few days, and in the only two cases in which the nature of the declaration admits of it, the record shews that the proceedings have been just such as are complained of in the case before us. The plaintiff sues in one of them upon a note for 12*l.* 10*s.*, for goods sold and delivered 25*l.*, interest 25*l.*, and account stated 25*l.*, and lays his damages in all at 40*l.*; and though the defendant has appealed, no question has been raised about the jurisdiction. In the other, the plaintiff sues in trover for a waggon, which being in an unfinished state, he describes it in one count as a complete waggon; in the other, he sues for certain waggon wheels, &c., describing the property in a different manner in four different counts, and valuing the goods in each at 15*l.*; but yet takes care to lay the damages, in conclusion, at 20*l.* only. No one who looks at this declaration, can imagine that the plaintiff is suing for four different waggons; but every one would understand the contrary.

I believe the practice to have been such throughout. It does not alter the effect of the statute, nor lead to anything being done against its intention. At one time, actions in this court, upon judgments in the District Court, were very common; and more judgments have also been removed into this court, for the purpose of obtaining more effectual process of execution. And, considering these opportunities which the court has had of observing the practice which has obtained from the beginning, that practice has, in my opinion, become so far binding upon us, that we ought not to overturn it, merely because it is inconsistent with legal fictions.

It is as important here as it is in England, and it is as much the duty of the courts to protect the public against the inconvenience and confusion that might follow from paying no regard to that which has been settled by long-established practice. However ready we are to follow the decisions of English courts, founded as they are upon the reasoning of judges of great learning and experience, yet we are not to adhere to them in disregard of all circumstances; for it is not in that spirit, nor to that extent, that the courts which made those decisions hold themselves to be bound by their own judgments or those of their predecessors.

The questions which have been raised here, have, it is true, been

raised upon a record of proceedings, which have taken place only under the act 8 Vic. ch. 13, under which statute there has not been time for very many precedents to accumulate, or any long practice to become confirmed, though I have no doubt there have been executions issued upon some hundreds of judgments liable to the same exceptions; and the questions which are raised here might equally be raised under all the former acts, the same, I mean, in principle; for it must be held, that all actions in the District Courts, since the 8th Vic. ch. 13, have been *coram non judice*, where the damages are laid at more than 25*l.*, without averring that the amount has been ascertained by the signature of the defendant, or whenever the declaration contains several counts for sums which, added together, exceed 50*l.*; so it must, upon the same principle, be held, that all actions under the former statutes have been *coram non judice*, when the sums in the several counts, being added together, would exceed 40*l.*, or when damages beyond 15*l.* were claimed, without averring that the amount had been liquidated by the nature of the transaction or the act of the parties.

It is only the same practice, continued under statutory provisions of the same nature, binding upon the same courts, a practice not inconsistent with good sense, and not leading to anything wrong in substance, or contrary to the intention of the legislature, though deviating from what I think an adherence to form, would have led this court to lay down in the first instance as the proper and regular mode of proceeding.

MACAULAY, J.—It certainly appears to me, that the declaration is bad, as exceeding the jurisdiction of the court on the face of it.

The statute 8 Vic. ch. 13, in the first place, limits the jurisdiction in all causes or suits relating to debt, covenant or contract, to 25*l.*, and then, in cases of contract or debt on the common counts, extends it to 50*l.*, where the amount is ascertained by the signature of the defendant.

Now, actions in inferior courts must, on the face of the proceedings, appear to be *primâ facie* within their jurisdiction (1 Saund. 74; 1 T. R. 151; Willes, 30; 4 Taunt. 50; 1 Dow. N. S. 168; 3 M. & G. 375; 3 M. & W. 125); and a declaration for any debt, or on any covenant or contract within 25*l.*, or for any contract or debt within 50*l.*, when the amount is alleged, or appears to be ascertained by the signature of the party, is good.

But I do not see that a declaration in debt, covenant or contract, under the first clause, to the extent of 25*l.*, with a second count in debt or contract, to the amount of 25*l.*, so ascertained, is valid; because it would, in fact, treat the statute as if it had said, "and in cases of contract or debt, &c., where *half* the amount is ascertained by the signature of the party, to 50*l.*"

I consider the true construction to be, that whenever the sum sought to be recovered exceeds 25*l.*, it must appear that the amount is ascertained by the signature of the party. The 51st section of the act aids this construction.

2ndly, I look upon the declaration as bad, for seeking to recover 49*l.* damages, without shewing any part of the amount to be ascertained by the signature of the defendant; and for the further reason, that in the



first count it claims an indefinite sum, and the plaintiff may be seeking damages thereunder to the amount of 48*l.* or more, without any written recognition signed by the defendant; and in each of the 2nd and 3rd counts he alleges a debt of 25*l.*, making together 50*l.*, the full extent of the jurisdiction, irrespective of the 1st count, without shewing any part of either demand to be ascertained by the defendant's signature.

Nor do I consider it a sufficient answer, that the damages laid are within 50*l.*, and that in *assumpsit*, like this, the plaintiff can recover no more. That is quite true; but the objection is, that the defendant is required to plead to and answer a higher demand.—2 B. & C. 477.

He must plead to each count, and answer the demand made therein, not the damages laid at the end. A plea of payment or set-off, for example, would not be a good bar, unless pleaded to the whole sum claimed in each count. And if this declaration be good, a party might be cited, and compelled to answer to demands, however numerous, or perhaps however great, so long as the damages were laid within 50*l.*—a course that I do not think admissible.

The jurisdiction appears to me quite clear. It extends to any debt, covenant or contract, not exceeding 25*l.* If exceeding 25*l.*, then only in cases of contract or debt, where the amount is ascertained by the signature of the defendant, and it so appears, or is averred.

I am not aware of any contrary construction given by the profession, in practice, to former statutes, which statutes were, however, differently worded, nor do I see that the present act is susceptible of such a construction, unless by holding that it in the first place confers a jurisdiction, in all the cases enumerated, to 25*l.*, and *beyond* that, up to 50*l.*, where the amount exceeding 25*l.* is ascertained by the signature of the party; in effect requiring half only, and not the whole amount, to be so ascertained. But whatever construction on this head, long usage, treating all the acts *in pari materiâ*, may require, I still should think, that whenever the demand sought to be recovered exceeded 25*l.*, it should appear that such excess at least was ascertained as required by the statute, which is not the case here.

As to the apprehended inconvenience of such a decision, I do not understand Mr. Burns, in the able judgment delivered by him, to suggest or to rest his opinion upon any such ground, nor did I understand it to be advanced in argument, nor am I aware (beyond mere surmise) of any long-prevailing mode of declaring in the district courts throughout the province, inconsistent with the proper limits of their jurisdiction; and if the fact is so, it by no means follows that the error, instead of being corrected, should be confirmed, in order to support a practical misconstruction of statutes no longer in force.

The objection to the declaration was not made before Mr. Burns, and his opinion on the question of jurisdiction is principally confined to the verdict of 27*l.*, objected to as exceeding by 2*l.* what the evidence warranted, assuming the declaration to be well framed.

It is true, he said it was an important question as respected thousands of other suits; but he did not say this of the past—rather, as I understand him, of the future; nor was he speaking in reference to the form of declaring; nor does he anywhere intimate what he supposed the course here-



tofore to have been ; and so far as any usage of long standing, if admitted, might acquire weight, as indicating the general opinion of the profession, he said he knew he was expressing views very much at variance with the ideas of many members of the profession, and that he hoped the matter might be set at rest by the judgment of a superior court, not on the grounds of usage and inconvenience, but, as I infer, upon its legal merits, and it is in that light that I have considered the case.

I have also regarded it as a general question, and the objections as admissible after verdict ; for any opinion rested on the narrow ground of acquiescence and waiver, however expedient to be applied, if possible, to cases conducted to final judgments and executions under former statutes, would, if adopted in the first instance, leave the objection still open to be revived by plea, or otherwise, in the next action that may be brought with a declaration similarly framed.

In addition to which, it appears to me that the objection to the present declaration, as ostensibly exceeding the jurisdiction, being upon the record, may be taken at any stage of the proceedings, and is not cured by a general verdict or a judgment for a sum not exceeding 49*l.*, the damages laid.

If (as respects the future) I felt at liberty to assume and give effect to a form of declaring, such as this case presents, by reason of its general and long-established use, I should be quite disposed to do so, to whatever extent a rule could be laid down to serve as a guide hereafter ; but I must confess my inability to find any case in which long usage has been admitted on such slight grounds, or been allowed to confer upon a court of limited jurisdiction, created by statute, forms of declaring not importing on the face of them to be within such jurisdiction, but so framed as to warrant an excess thereof in evidence, consistently with the pleadings.

Nor do I consider it a sufficient excuse for it, that the various counts, though together beyond the jurisdiction, may in truth be only intended to cover one and the same demand, or an amount quite within it.

I do not think that several distinct counts, either in the district courts or in this court, can, upon demurrer or in error, be intended to constitute one and the same demand, unless it so appears on the face of the declaration, unless the same sum can be claimed under one general count, as, 25*l.* for goods sold and delivered, work and labour, money lent, and on account stated, &c. (1 D. & L. 189 ; 5 Bing. N. S. 533), leaving it uncertain how much is demanded in respect of each, otherwise than as explained by the plaintiff's bill of particulars, or under counts respectively stated to be for the same demand, though varied in form, as upon a promissory note, the consideration for the note, and an account stated in relation to the arrears due thereon.

I do not see any other way of declaring, without an apparent excess of the jurisdiction. I am disposed to think that such a method might be adopted, to enable the plaintiff to shape his demand in different forms, without appearing to claim in the whole a sum not clearly within the jurisdiction ; but if it cannot be done, it is a consequence of the limited nature of the jurisdiction that counts for the same demand cannot be multiplied in the district courts, as may be done in this ; and in this

court, the plaintiff is only entitled to recover on such counts as he shall support in evidence by proof of distinct causes of action.

If, under the views entertained by the rest of the court, a plaintiff in a district court may declare in several counts, for sums not exceeding 50*l.* in each, without averring the amount, although upwards of 25*l.*, to have been ascertained by the signature of the defendant, and may introduce several counts, whether for sums under or over 25*l.* each, and together far exceeding 50*l.*, so that he lays his damages at not more than 50*l.*, and further, if he is so permitted to declare only when the same evidence may support each and all the counts, or when a judgment upon either of them could be pleaded in bar to any further action for the same demand, under counts differently framed, a rule may be afforded, calculated to define the limits to this mode of declaring, and to govern parties hereafter.

Whatever the declaration may be, no practical inconvenience will perhaps arise, while the district judges at the trial confine plaintiffs within the jurisdiction in the proofs and verdict.

The objection to such a system is, that sums on the face of the declaration are treated as immaterial, in relation to the jurisdiction; that it imports a general jurisdiction to 50*l.*, at least in all cases; that the jurisdiction, where within 25*l.*, may be constantly overstepped at the trial, without anything in the record to shew it, unless by special verdict or bill of exceptions; and that the rule is violated which requires proceedings in inferior courts (though of record) to appear on the face of them *primâ facie* within the jurisdiction.

I take the rule to be, not that the proceedings in such courts are valid, unless they shew that the jurisdiction is exceeded, but that they are invalid, unless they import that it has not been exceeded.

The present declaration illustrates it. It does not appear *conclusively* on the face thereof that the jurisdiction of the court has been exceeded, because the plaintiff's demand may in evidence be restricted to 25*l.*, unless ascertained by the signature of the defendant, in which event it might extend to 49*l.*; but certainly it does not appear that the jurisdiction has not been or cannot be exceeded; for in the first count no sum is named, and damages may be sought, limited only by those laid at the end of the declaration. The 2nd and 3rd counts are for 25*l.* each, of themselves equalling the full extent of the jurisdiction, and 49*l.* damages are laid, without any part of the demand appearing to be admitted by the defendant's signature; so that, whether the test be the sums claimed in the several counts, or the damage laid at the end, it does not appear to be within the jurisdiction by either, as it ought by both.

What judges have said, or courts decided, in particular cases, must be taken in reference to the special circumstances before them. A case in which a prohibition was denied after sentence, as in *Buggin v. Bennett*, 4 Bur. 2035, does not appear to me to afford a rule of construction touching the jurisdiction, or form of proceeding of inferior courts upon writs of false judgment or of error.

The rules are indeed reversed. A prohibition is only granted after sentence, where it appears that the jurisdiction has been exceeded, unless for misconstruction of an act of parliament, which is an exception. (See 3 East. 476, & 5 East. 348.) Upon a writ of false judgment or

error the judgment will be reversed, unless the cause of action appears to be within the jurisdiction.

Nor does a case upon a doubtful question, as to the validity of a *venire* in a crown case, being *vicineto de Bewdley*, instead of *de corpore comitatus*, according to 4 & 5 Anne, ch. 16, the crown having for ten years been regarded as excepted on the ground of prerogative (1 P. Wm. 223), afford a precedent, or constitute a principle applicable to questions of jurisdiction or pleading in inferior courts.

Nor do I perceive the force of decisions touching convictions on points, in which the jurisdiction was not involved, as *Jones v. Smart*, 1 T. R. 44, in which the question was, whether, in a statute respecting the Game Laws, other than the son and heir-apparent of an esquire or *other* person of higher degree, the latter word *other* related to the *son* of a person, or to the person of higher degree. A former statute had the word "of" before "other," and a case had been previously decided which a majority of the court upheld, though not unanimously, and in which some reliance was placed upon printed precedents in *Burns' Justice*, of *Rex v. Thompson*, 2 T. R. 18, in which, upon a conviction for killing game, the evidence was not set out fully, yet held sufficient. The precedent was taken from *Burns*, and upheld, owing to the multiplicity of convictions, in that form, though considered incorrect in itself.

Reliance was also placed on a case cited, where the same objection had been taken and overruled. Yet here the court was not unanimous, *Grose, J.*, at first differing in opinion. These two last cases were cited in argument, in *The King v. Mason*, 585, in the same volume 2 T. R., in support of an indictment for obtaining money by false pretences, without shewing what they were, yet unsuccessfully. *Buller, J.*, said he was clear that the precedents had not been invariably in the form asserted; and *Grose, J.*, said, with respect to any practice founded on any faulty precedent, if such a practice had prevailed, it was time it should be rectified, and denied that it had always prevailed, as he knew one instance to the contrary.

I find it constantly held, that orders and convictions of magistrates must on the face of them appear to be within the jurisdiction imported by the statute under which they are made. (2 D. & R. 212; 1 B. & C. 101; *Paley on Convictions*, 69, 70, 337; 13 East. 141; 2 D. & R. 209; 2 B. & C. 31; *R. v. Hawkins*, 2 H. B. 533; 1 Bur. 445; 1 T. R. 727-8 & 151-3; 1 Saund. 90; 1 Sid. 65; *Vaughan*, 170; 2 Mod. 102, 207; 2 Jurist, 312; 3 B. & C. 772, & 5 D. R. 719; 2 East. 56; 1 East. 278; 14 East. 267; 6 T. R. 583; 7 B. & C. 790; 8 Jurist, 836; 2 Q. B. 978; *Willes*, 30, 688; 1 Dow, N. S. 168; 3 M. & G. 375; 9 Dow. 489; 10 Jurist, 572-4; *Taunt.* 49; 2 Wil. 16-26; 2 T. R. 652-3.)

And pleas of justification, under judgments of inferior courts, must always aver or shew the cause of action to have been within the jurisdiction.

In addition to all which, the language of the present District Court Act is manifestly different from the former acts, in the terms in which jurisdiction is conferred. Formerly, it was limited in all cases of contract to 15*l.*, and when the amount was liquidated or ascertained by the act of the parties or the nature of the transaction, to 40*l.*; at pre-



sent, it can only exceed 25*l.*, where the amount is ascertained by the signature of the defendant. Now, the words "liquidated or ascertained" by the act of the parties or the nature of the transaction," are evidently less definite and of more doubtful import than the words "ascertained by the signature of the defendant;" and until March, 1845, when the statute 8 Vic. ch. 13, was passed, any misconstruction or faulty mode of declaring that may have prevailed, must have been in relation to the 2nd Geo 4, ch. 2, or earlier statutes, which were more ambiguous than the present, and the validity of any past proceedings under the repealed acts we are not now called upon to consider. Why an unauthorised mode of declaring or proceeding, under repealed statutes, should, upon the principle of construing all *in pari materiâ*, be allowed to sanction similar faults under the existing act, which is differently expressed, I do not see. The very alteration in the terms of it shews that a new rule of jurisdiction was substituted, and the altered and plainer terms used call for a corresponding change in the construction and pleadings; the courts being continued as the same courts can make no difference, for though they are the same courts, still their jurisdiction has been altered or extended.

The verdict seems to be void, confining attention to the record only, as exceeding 25*l.*, without its appearing to have been ascertained by the defendant's signature.

Turning from the record to the evidence, it is admitted no writing was produced, and that it exceeded what the jurisdiction under the evidence admitted, and it seems to me equally void, and not curable by a *remittitur damna*. A *remittitur* is, on the face of the proceedings, the spontaneous act of the party, though of course with the implied leave of the court; and although a verdict, itself within the jurisdiction, but exceeding the damages laid, may be rendered valid in that way, I do not find that a verdict exceeding the jurisdiction can be so cured.

It would appear that the court could receive and record such a verdict, whereas it had no jurisdiction to do so. It is just as if a declaration with one count for 25*l.*, with damages laid at 25*l.*, a verdict was entered for 27*l.*, upon a demand appearing not to have been ascertained as the statute directs. Such a verdict seems to me invalid, and not made good by the plaintiff's relinquishing the excess by a *remittitur damna*. The difference is, that in a court of superior jurisdiction the verdict would not be void; whereas, in an inferior court, it is *coram non judice* treated as void or out of court. The proper course would have been for the court to have declined entering a verdict exceeding 25*l.*; and unless the present can be amended by the judge's notes, I do not see my way in holding it curable by *remittitur damna*.

But as the majority of the court deem the verdict good and tenable, it may of course be reduced by a *remittitur damna*, as well as in this court, or may be set aside and a new trial granted.

Of course a jury cannot oust the court of its jurisdiction by rendering a verdict exceeding their power; nor can the court record such a verdict, without invalidating its own act. The verdict should be confined within the limits of the jurisdiction.

It appears to have been inadvertently entered in this instance, and is seemingly in accordance with the justice of the case; and if all can be made right by a *remittitur*, it is desirable that it should be done. My diffi-



culty arises out of the technical objections to which the proceedings are open.

My opinion in this case is founded on views similar to those entertained by me in *McMurray v. Orr*, *Gardiner v. Stoddard*, and later cases in this court, on questions touching the plaintiff's right to costs in cases within the competence of the District Court.

The defendant's plea of set-off pays no regard to the jurisdiction of the court; and by the statute 11 Geo. IV. ch. 5, the defendant is entitled to a verdict for the excess, should there be any, beyond what the plaintiff proves, but surely not to any amount the defendant may be able to prove, however much beyond the jurisdiction of the court. It appears to me, that the defendant's set-off must be governed by the same rules, and restrained within the same limits, as the plaintiff's demand.

The first count is also probably bad, on the ground that the consideration laid for the defendant's special promise is a past-executed one, if the work was done at the defendant's request, which is not stated.—See 5 M. & W. 241; 8 Scott, 502. And if this count is bad, the verdict being general, no judgment can be given on it. But this is not made a ground of objection.

JONES, J.—Since the establishment of the district courts in 1822, a plaintiff has been permitted to recover to the full extent of the jurisdiction—that is 40*l.* (before the late act, and after the act of 1822), his claim consisting (in *assumpsit*) of an unliquidated account or damages to 15*l.*, and a liquidated claim, such as a promissory note, to 25*l.*, making together 40*l.*, the damages at the conclusion of the declaration being laid at the latter sum.

The declaration consisted generally of a number of counts, claiming in each common count a sum not exceeding 40*l.*, the aggregate of all amounting sometimes to much more, the damages being laid at that amount, the extent of the jurisdiction.

This I know to have been the practice and construction of the law in several districts, and this construction has been sanctioned by this court, when certificates, entitling the plaintiff to Queen's Bench costs, have been refused, upon the ground that any sum less than 40*l.* could be recovered in the district courts, when the amount of an unliquidated claim did not exceed 15*l.*; and this construction, I am satisfied, was fully intended by the legislature: such was the course of this court from the establishment of the district courts, and fully determined upon argument in the cases of *Washburn v. Langley* and *Beattie et al. v. Cook*, Mich. 5. Vic.

Where such has been the construction for such a series of years, and all have acted upon it, and when the rights of persons may be seriously affected by a different construction, I think that we ought not now to hold differently, but leave the party to his writ of error, if error does in fact exist.

If it appeared clearly upon the face of the declaration that the claim was beyond the jurisdiction of the court, we must arrest the judgment. The plaintiff claims 49*l.* upon all his counts in the declaration, and in my judgment, he could have had a verdict for that amount, if, in addition to 25*l.* damages, established in evidence upon the first count, he had proved a promissory note to the amount of 24*l.*

The entering of the verdict for 27*l.* was incorrect, no claim being established by the evidence, except for unliquidated damages. 25*l.* was the extent to which damages could be assessed.

The verdict is wrong, and should not have been received, and although recorded, it was competent for the judge, when his attention was called to the fact, and before the discharge of the jury, to have amended it with their assent.

I think it should now be remitted by the plaintiff, and all will be right.

*Per Cur.*—Judgment below confirmed.

(MACAULAY, J., *dissentiente.*)

---

## IN THE QUEEN'S BENCH.

---

### RULES OF COURT.

HILARY TERM, 10 VICTORIA (FEBRUARY, 1847.)

---

It is ordered, that writs of trial and other proceedings under statute 8 Vic. chap. 13, secs. 51 and 54, shall be in the several forms in the schedule hereunto annexed, or to the like effect, *mutatis mutandis*: provided that in case of non compliance, the court or a judge may give leave to amend.

(Signed)

J. B. ROBINSON, C. J.

J. B. MACAULAY, J.

J. JONES, J.

A. McLEAN, J.

---

#### *Form of Issue when the Cause is to be tried by the Judge of the District Court.*

(After the joinder of issue proceed as follows:)

And forasmuch as the sum sought to be recovered in this suit, and indorsed on the copy of the original process served in this action, does not exceed 25*l*.

(Or)—And forasmuch as the debt or demand sought to be recovered in this action, is alleged to be ascertained by the signature of the defendant; hereupon on the (date of the writ of trial) day of — in the year — pursuant to the statute in that case made and provided, the judge of the — District Court is commanded that he proceed to try the issue (or issues) joined between the parties, at the first (or second) sittings to be next hereafter holden of the said District Court, by a jury returned for the trial of issues joined in the said court, and when the same shall have been tried, that he make known to the court here, what shall have been done by virtue of the writ of our lady the Queen, to him in that behalf directed, with the finding of the jury thereon indorsed, within ten days after the execution thereof (*a*.)

---

(*a*) 8 Vic. chap. 13, sec. 54.

*Form of the Writ of Trial.*

CANADA, } Victoria, by the Grace of God, of the United Kingdom  
 ———District. } of Great Britain and Ireland, Queen, Defender of the  
 Faith :

To the Judge of the District Court in and for the ——— District.

Whereas A. B. plaintiff, in our Court of Queen's Bench, in and for the Province of Upper Canada, at Toronto, on the ——— day of (date of the first writ of *capias ad respondendum*, or process, or of filing the bill, &c.) impleaded C. D. defendant, in an action on promises (or as the case may be) as follows : (here copy the declaration); and whereas the said defendant, on the ——— day of ——— last, by ——— his attorney (or in person, as the case may be) came into our said Court of Queen's Bench, and said (here recite the pleas and pleadings to the joinder of issue), and the plaintiff did the like (or as the case may be); and whereas the sum sought to be recovered in the said action, and indorsed on the copy of the original process served therein, does not exceed 25*l*.

(Or)—And whereas the debt or demand sought to be recovered in this action, is alleged to be ascertained by the signature of the defendant (or defendants), and it is fitting that the issue (or issues) above joined, should be tried by you, the said judge. We therefore, pursuant to the statute in such case made and provided, command you that you do proceed to try the said issue (or issues), at the first (or second) sittings of the said District Court, to be holden next after the date of this our writ, by a jury returned for the trial at the said sittings of issues joined in the said District Court; and when the same shall have been tried in manner aforesaid, we command you that you make known to us in our said Court of Queen's Bench, at Toronto, what shall have been done by virtue of this writ, with the finding of the jury hereon endorsed, within ten days after the execution hereof.

Witness the Honourable John Beverley Robinson, Chief Justice, at Toronto, the ——— day of ———, in the ——— year of our reign.

---

*Form of Indorsement thereon of Verdict.*

Afterwards, on the (day of trial) day of ——— in the year ——— before me ——— Esquire, Judge of the District Court in and for the District within mentioned, came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within named (as the case may be), and the jurors of the jury whereof mention is within made being summoned, also came, and being duly sworn to try the issue (or issues) within mentioned, on their oath said, &c. (according to the finding of the jury therein).

---

*Form in case of Nonsuit.*

Afterwards, on the (day of trial) day of ——— in the year ——— before me ——— Esquire, Judge of the ——— District Court within mentioned, came as well the within named-plaintiff as the within-named defendant, by their respective attorneys within named (or as the case may be), and the jurors of the jury whereof mention is within made being sum-



moned, also came, and being duly sworn to try the issue (or issues) within mentioned, were ready to give their verdict in that behalf, but the said plaintiff being solemnly called, came not, nor did he further prosecute his said suit against the said defendant.

---

*Form of Judgment for Plaintiff after Trial.*

Afterwards, on the (date of signing judgment) day of — in the year —, came the parties aforesaid by their respective attorneys aforesaid (or as the case may be), and the said judge, before whom the said issue (or issues) came on to be tried, hath sent hither the said last-mentioned writ, with an indorsement thereon, which said indorsement is in these words, to wit :

(Copy the indorsement).

Therefore it is considered, &c., (as in other cases).

---

*Form of Entry after Judgment by Default or on Demurrer, where Damages are to be assessed before a District Judge (a).*

(To the entry of interlocutory judgment :) Therefore it is considered the plaintiff ought to recover, (&c., inclusive. Then), And because it is unknown to the said court here, what damages the said (plaintiff) hath sustained by reason thereof, hereupon, on the (date of the writ of inquiry) day of — in the year —, pursuant to the statute in that case made and provided, the Judge of the — District Court is commanded that he proceed diligently to inquire what damages the said plaintiff hath sustained by reason of the premises, at the first (or second) sittings to be next hereafter holden of the said District Court, by a jury returned at such sittings for the trial of issues joined, and for the assessment of damages upon judgments obtained by default or upon demurrer in the said District Court, and when the same shall have been assessed, that he make known to the court here what shall have been done by virtue of the writ of our lady the Queen, to him in that behalf directed, with the finding of the jury thereon indorsed, within ten days after the execution thereof (b).

---

*Form of Writ of Inquiry.*

CANADA, } Victoria, by the Grace of God, of the United Kingdom  
 ——— District. } of Great Britain and Ireland, Queen, Defender of the Faith :

To the Judge of the District Court in and for the — District.

Whereas, A. B. plaintiff, in our Court of Queen's Bench, in and for the Province of Upper Canada, at Toronto, on the day of (date of first writ of *capias ad respondendum* or process) impleaded C. D. defendant, in an action on promises (or as the case may be) as follows :

(Copy the declaration).

And whereas the said defendant, on the — day of — last, came in his own proper person (or as the case may be), into our said Court of

Queen's Bench, and said (\*) nothing in bar or preclusion of the said action of the said plaintiff, whereby the said plaintiff remained undefended against the said defendant.

(Or, in case of judgment on demurrer, from "and said" *supra*, (\*) recite the pleas and subsequent pleadings to the joinder in demurrer and judgment thereon, as in other like cases in this court, then proceed as follows:)

Wherefore the said plaintiff ought to recover against the said defendant his damages on occasion of the premises, but because it is unknown to the said court here, what damages the said plaintiff hath sustained by reason thereof, and it is fitting that the same should be inquired of by you, the said judge: We therefore, pursuant to the statute in such case made and provided, command you that you do proceed diligently to inquire what damages the said plaintiff hath sustained by reason of the premises aforesaid, at the first (or second) sittings to be next hereafter holden of the said District Court, by a jury returned at such sittings (a) for the trial of issues joined, and for the assessment of damages upon judgments obtained by default or upon demurrer, in the said District Court, and when the same shall have been assessed in manner aforesaid, we command you that you make known to our Justices of our said Court of Queen's Bench at Toronto, what shall have been done by virtue of this writ, with the finding of the jury hereon indorsed, within ten days next after the execution thereof.

Witness the Honourable John Beverley Robinson, Chief Justice, at Toronto, the —— day of ——, in the —— year of our reign.

---

*Form of Return to be endorsed.*

Afterwards, on the —— day of —— in the year (day of assessment) before me ——, Esquire, Judge of the District Court in and for the —— District within mentioned, came the within-named plaintiff by his attorney within named; and the jurors of the jury whereof mention is within made being summoned, also came, and being duly sworn to inquire of and assess the damages sustained by the said plaintiff, by reason of the premises within mentioned, on their oath said, that the said plaintiff hath sustained damages on occasion thereof, over and above his costs and charges by him about his suit in that behalf expended, to £——.

---

*Form of Judgment.*

Afterwards, on the —— day of —— in the year ——, came the said plaintiff by his (or the) attorney aforesaid, and the said judge, before whom the said damages were inquired of and assessed, hath sent hither the said last-mentioned writ with an indorsement thereon, which said indorsement is in these words, to wit:

(Copy the indorsement).

Therefore it is considered, &c.

*Form of Issue, &c., where Issues are to be tried, and Damages assessed before the District Court.*

(To the joinder of issue, adding the similiter, and to the joinder in demurrer, or to the joinder of the issue to be tried by the record, or to the interlocutory judgment by default, or to the judgment for the plaintiff on demurrer, or to judgment upon the issue to be tried by the record (as the case may be), and where there is an interlocutory judgment or a judgment by default, or judgment upon demurrer, or upon the issue to be tried by the record, proceed to the entry.) Wherefore the said plaintiff ought to recover against the said defendant, his damages on occasion of the premises, &c.

(If there be interlocutory judgment, or judgment on demurrer, or in the trial by the record:)

And because it is at present unknown to the court here, whether the said defendant will be convicted of the premises upon which the said issue (or issues) is (or are) above joined between the parties or not; and because it is also unknown to the court here, what damages the said plaintiff hath sustained on occasion of the premises whereof it is considered that the said plaintiff ought to recover his damages as aforesaid, and it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment in this behalf against the said defendant be stayed, until the trial of the said issue (or issues) above joined between the said parties to be tried by the country—

(If before judgment on demurrer, or upon the issue to the record.)

(Or)—And because the court here, are not yet advised what judgment to give upon the premises, whereof the parties have put themselves upon the judgment of the court—

(Or)—Upon the premises whereon issue is joined between the said parties, to be tried by the record (as the case may be)—

And because it is convenient and necessary that there be but one taxation of damages in this suit, and forasmuch as the sum sought to be recovered in this suit, and indorsed on the copy of the original process served in this action, does not exceed 25*l*.—

(Or)—And forasmuch as the debt or demand sought to be recovered in this action, is alleged to be ascertained by the signature of the defendant hereupon, on the — day of — in the year (date of the writ of trial) pursuant to the statute in that case made and provided, the Judge of the — District Court is commanded that he proceed as well to try the said issue (or issues) joined between the parties to be tried by the country, as also diligently to inquire what damages the said plaintiff hath sustained on occasion of the premises, whereof it is considered that the said plaintiff ought to recover against the said defendant his damages on occasion thereof as aforesaid.

(Or)—Whereof the parties have put themselves upon the judgment of the court, as aforesaid—

(Or)—Whereon issue is joined between the parties to be tried by the record as aforesaid (as the case may be), if judgment shall happen to be thereupon given for the said plaintiff, at the first (or second) sittings to be next hereafter holden of the said District Court, by a jury returned at such sittings for the trial of issues joined, and for the assessment of

damages upon judgments obtained by default or upon demurrer, in the said District Court, and when the same shall have been tried and assessed, that he make known to the court here, what shall have been done by virtue of the writ of our lady the Queen, to him in that behalf directed, with the finding of the jury thereupon indorsed, within ten days next after execution thereof.

---

*Form of Writ to try Issues and to assess Damages contingently upon Demurrer or Issue to the Record, or where there is Interlocutory Judgment, or Judgment on Demurrer as to part.*

CANADA, } Victoria, by the Grace of God, of the United Kingdom  
 ———District. } of Great Britain and Ireland, Queen, Defender of the  
                           Faith :

To the Judge of the ——— District Court in and for the ——— District.

Whereas A. B. plaintiff, in our Court of Queen's Bench in and for the Province of Upper Canada, at Toronto, on the (day of the first writ of *capias ad respondendum* or process), day of ——— in the year ———, impleaded C. D. defendant in an action on promises (or as the case may be), as follows :

(Copy the declaration).

And whereas the said defendant, on the ——— day of ——— by his attorney (or in person), came into our said Court of Queen's Bench, and said (recite the pleas and pleadings to the joinder of issue, adding the *similiter*, and to the joinder in demurrer, or to the joinder of the issue to be tried by the record, or to the interlocutory judgment or judgment by default, or to the judgment for plaintiff on demurrer, or upon the issue to be tried by the record, as the case may be ; and where there is interlocutory judgment by default, or judgment upon demurrer, or upon the issue to the record, proceed to the entry). Wherefore, it was considered that the said plaintiff ought to recover against the said defendant his damages on occasion of the premises. (Then :) And whereas it is at present unknown to the said court here, whether the said defendant will be convicted of the premises upon which the said issue (or issues), is (or are) joined between the parties or not ; and whereas it is also unknown to the said court here, what damages the said plaintiff hath sustained on occasion of the premises, whereof it is considered that the said plaintiff ought to recover his damages as aforesaid, and it is convenient and necessary that there be but one taxation of damages in this suit, the giving of judgment against the said defendant in this behalf is stayed until the trial of the said issue (or issues) so joined between the said parties, to be tried by the country as aforesaid.

(Or)—And whereas the court here are not yet advised what judgment to give upon the premises, whereof the parties have put themselves upon the judgment of the court—

(Or)—Upon the premises whereon issue is joined between the said parties, to be tried by the record (as the case may be) ; and whereas it is convenient and necessary that there be but one taxation of damages in this suit ; and whereas the sum sought to be recovered in this suit, and indorsed on the copy of the original process served in this action, does not exceed 25*l*.—



(Or)—And forasmuch as the debt or demand sought to be recovered in this action, is alleged to be ascertained by the signature of the defendant; and whereas it is fitting that the said issue (or issues) joined between the parties to be tried by the country, should be tried by you the said judge, and that the damages of the said plaintiff on occasion of the premises, whereof it is considered that the said plaintiff ought to recover his damages as aforesaid—

(Or)—On occasion of the premises, whereof the parties have put themselves upon the judgment of the court as aforesaid—

(Or)—Wherein issue is joined between the said parties, to be tried by the record as aforesaid (as the case may be) should, at the same time be inquired of by you the said judge: We therefore, pursuant to the statute in such case made and provided, command you that you do proceed to try the said issue (or issues) joined between the parties, to be tried by the country; and also, at the same time, diligently inquire what damages the said plaintiff hath sustained by occasion of the premises, whereof it is considered that the said plaintiff ought to recover against the said defendant his damages on occasion thereof as aforesaid.

(Or)—The premises, whereof the parties have put themselves upon the judgment of the court as aforesaid—

(Or)—Whereon issue is joined between the parties, to be tried by the record as aforesaid (as the case may be), if judgment shall happen to be thereupon given for the said plaintiff at the first (or second) sittings to be next hereafter holden of the said District Court, by a jury returned at such sittings for the trial of issues joined, and for the assessment of damages upon judgments obtained by default or upon demurrer, in the said District Court, and where the same shall have been tried and assessed, as aforesaid, that you make known to us in our said Court of Queen's Bench, at Toronto, what shall have been done by virtue of this writ, with the finding of the jury hereupon indorsed, within ten days after the execution hereof.

Witness the Honourable John Beverley Robinson, Chief Justice, at Toronto, the —— day of ——, in the —— year of our reign.

---

*Form of Indorsement of Verdict thereon.*

Afterwards, on the (day of trial and of assessment), day of —— in the year ——, before me ——, Esquire, Judge of the District Court, in and for the —— District within mentioned, came as well the within-named plaintiff as the within-named defendant, by their respective attorneys within named (as the case may be), and the jurors of the jury whereof mention is within made, being summoned, also came, and being duly sworn to try the issue (or issues), and also, to inquire of and assess the damages sustained by the said plaintiff on occasion of the premises within mentioned, on their oath said, &c., (according to the finding of the jury on the issues, and if for the plaintiff then,) And the jurors aforesaid, upon their oath aforesaid said, that the said plaintiff hath sustained damages on occasion thereof, and on occasion of the premises within mentioned, over and above his costs and charges by him about his suit in that behalf expended, to £——

*If Nonsuit.*

Afterwards, on the (day of trial and assessment) day of — in the year of —, before me —, Esquire, Judge of the District Court in and for the — District within mentioned, came as well the within-named plaintiff as the within-named defendant, by their respective attornies within named (as the case may be), and the jurors of the jury whereof mentioned is within made, being summoned, also came, and being duly sworn to try the issue (or issues), and also to inquire of and assess the damages sustained by the said plaintiff on occasion of the premises within mentioned, were ready to give their verdict in that behalf, but the said plaintiff, being solemnly called, came not, nor did he further prosecute his said suit against the said defendant.

*Form of Entry after the Return of the Writ.*

Afterwards, on the — day of — in the year —, came the parties aforesaid by their attornies aforesaid (or as the case may be), and the said judge, before whom the said issue (or issues) was (or were) tried, and the said damages were inquired of and assessed, hath sent hither the said last mentioned writ with his indorsement thereon, which said indorsement is in these words, to wit:

(Copy indorsement).

(And then, if there be already interlocutory judgment, or judgment on the demurrer, or upon the issue to the record, proceed at once to final judgment:)

Therefore, &c.,

(Or, if the issue on demurrer or to be tried by the record, be still undecided, then proceed in the usual form with the entries to judgment on the demurrer or upon the issue to the record, and to final judgment).

*Ordered*, that the following Costs be allowed in obtaining Writs of Trial. The usual costs in like cases to issue joined.

Drawing affidavits of proceedings and paid .....	£0	3	6
Attending chambers for summons, 1s. 3d.; fee thereon, 1s. 3d.	0	2	6
Paid, 1s. 7d.; attending to serve, 1s. 3d.; affidavit and paid, 3s. 6d.	0	6	4
Attending chambers for order, 1s. 3d.; fee thereon, 5s. ....	0	6	3
Attending to serve, 1s. 3d.; copy, 1s. ....	0	2	3
Drawing writ, same as nisi prius record. ....			
Attending office to get examined and sealed, do. ....			
Paid do. do. do. ....			
Notice of trial, same as in other cases. ....			
The sta- { Attending to enter with District Clerk .....	Same as in District Court, as perschedule 8 Vic. ch. 13.		
tute is re- { Attending Court .....			
trictive. { Brief and fee .....			
Attending Judge of District Court for return. ....	0	1	3
Attending to file .....	0	1	3

*Disbursements.*

District Judge, 5s. or 10s. as the case may be, .....	} Same as in Dist. Court, as per sche- dule, 8 Vic. ch. 13.
Clerk District Court, 2s 6d. ....	
Sheriff, 4s. ....	
Jury, 7s. 6d. ....	
Crier, 6d., 1s., or 3d. (as the case may be) ...	

*Costs of Writ of Inquiry.*

Drawing writ, same as nisi prius record .....	
Attending to examine and get sealed, do. ....	
Attending to enter with District Clerk, same as in District Court .....	
Notice of assessment, same as in other like cases.....	
Attending court, } same as in District Court .....	
Brief and fee, }	
Attending Judge for return .....	0 1 3
Attending to file .....	0 1 3

*Disbursed.*

On same scale as above .....	
(Signed)	J. B. ROBINSON, C. J. J. B. MACAULAY, J. J. JONES, J. A. McLEAN, J.

IN THE QUEEN'S BENCH.

HILARY TERM, 10 VICTORIA (FEBRUARY 12, 1847.)

It is ordered by the Court, that from and after this present Term of Hilary, the rule of this Court of Easter Term, 11 Geo. IV., regulating costs in civil and criminal cases, be rescinded, so far as regards the fees allowed to be taken by Sheriffs for any services rendered by them; and that from and after the present Term of Hilary, the fees hereinafter expressed shall be allowed to be taken by any Sheriff in Upper Canada, for the services respectively rendered by him.

(Signed) J. B. ROBINSON, C. J.,  
J. B. MACAULAY, J.,  
J. JONES, J.,  
A. McLEAN, J.

*Sheriff, in Civil Cases.*

	£	s.	d.
For every warrant to arrest under any process, or to levy, or to attach, or to execute any final process, when given to a Bailiff, not being Deputy-Sheriff.....	0	2	6

Arrest, where amount endorsed shall not exceed 50 <i>l</i> .....	0	5	0
Arrest, where the amount shall be over 50 <i>l</i> . and under 100 <i>l</i> .....	0	10	0
Arrest, where the amount shall be 100 <i>l</i> . and over.....	1	0	0
Mileage on going to arrest, when arrest made, per mile...	0	0	6
Mileage on conveying defendant to gaol from place of arrest, per mile .....	0	0	6
Bail-bond, or bond for the limits.....	0	5	0
Assignment of the same.....	0	5	0
Service of process not bailable (including affidavit of service), for each defendant.....	0	5	0
Service of scire facias, for each party served.....	0	5	0
For each summoner, to be paid to him by the Sheriff.....	0	2	6
Serving subpoenas, declarations, notices, or other papers, be- sides mileage on each party or witness.....	0	2	6
Receiving, filing and entering all writs, declarations, rules, notices, or other papers to be served, each.....	0	1	3
Return of all bailable writs, writs of execution, or attachments	0	2	6
Every search, not being by a party in the cause or his attorney .....	0	1	0
Certificate of result of search, when required for any purpose	0	2	6
Fee on striking special jury.....	1	0	0
Serving each special juror.....	0	1	3
Summoning special jury, travelling per mile, from court-house	0	0	6
Returning panel of special jurors.....	0	5	0
Every jury sworn.....	0	5	0
Attending view, per diem.....	1	0	0
Poundage on executions and attachments in the nature of executions, where the sum levied and made shall not ex- ceed 100 <i>l</i> ., per cent.....	5	0	0
Where it shall exceed 100 <i>l</i> ., and be less than 1,000 <i>l</i> ., for first 100 <i>l</i> ., per cent.....	5	0	0
For residue, per cent.....	2	10	0
Over 1,000 <i>l</i> ., on whatever exceeds 1,000 <i>l</i> ., in addition to the poundage hereby allowed, up to 1,000 <i>l</i> ., per cent....	0	5	0
In lieu of all fees and charges for services and disburse- ments, except mileage in going to seize, and disbursements for advertisements, and except disbursements necessarily incurred in the case, and removal of property, in cases not exceeding 100 <i>l</i> . to be allowed by the Master in his dis- cretion.			
For schedule of goods taken in execution, including copy to defendant, if not exceeding five folios, of 100 words.....	0	5	0
For each folio above five folios.....	0	0	6
Advertisements of lands in the Gazette, the sum actually disbursed.			
Drawing up advertisements, when required by law to be published in a newspaper, and transmitting same, in each suit .....	0	5	0
Notice of sale of goods, in each suit.....	0	2	6
Notice of postponement of sale in each suit.....	0	1	3
Service of writ of possession or restitution, besides travel...	1	0	0



Bringing up prisoner on attachment or habeas corpus, besides travel at 1s. per mile.....	1	0	0
For travel from court-house to place of service of process, and in all cases for actual mileage when service is performed.....	0	0	6
For ineffectual attempt to make personal service when necessary, or arrest, not having served any other process on the same occasion (upon taking the subjoined affidavit), per mile .....	0	0	6
Seizure of estate and effects on attachment, under Absconding Debtors Act .....	0	10	0
Taking inventory, same as in executions.			
Removing or retaining property, such disbursements as shall be ordered by the Master or the Court, or a Judge thereof.			

*In Criminal Cases.*

Such fees as are established by the rule of this Court of Michaelmas Term, 9 Victoria, under the authority of the statute 8 Victoria, c. 38.

*Affidavit to be made in order to entitle the Officer to Mileage, upon an ineffectual attempt to serve Process or to make Arrest.*

In the — Court, }  
C. D. v. E. F. }

I, A. B., of &c. — Bailiff of the Sheriff of —, make oath and say, that on the — day of — 18 —, I endeavoured to serve the above-named — with a copy of — (or, "to arrest the above-named —," as the case may be), and that, for that purpose, I went to the place of residence of the said —, in the township of — (or as the case may be), and made due enquiries concerning him at his residence (or as the case may be) and in the neighbourhood thereof; and that after using due diligence, I could not succeed in making such service (or arrest), in consequence of (here state the reason); and I further swear, that I necessarily travelled in attempting to make such service — miles, exclusive of any mileage travelled upon the same occasion, for which I am entitled to be remunerated in any other case.

IN THE QUEEN'S BENCH.

HILARY TERM, 10 VICTORIA (SATURDAY, FEBRUARY 13, 1847.)

It is ordered, that from and after the first day of next Easter Term, the rules of this Court made in Easter Term, 11 Geo. IV., and numbered 14 and 15, respecting the furnishing to the Master copies of bills of

costs, taxed at more than 20*l.*, and the delivery of such copies into Court, and respecting orders to revise taxation, be rescinded; and that from henceforth, the practice of this Court, in regard to notice to be given by one party to the other, of taxation of costs, and in regard to the obtaining orders for revising taxation, shall be the same as the present practice in the Court of Queen's Bench in England.

(Signed)

J. B. ROBINSON, C. J.

J. B. MACAULAY, J.

J. JONES, J.

A. McLEAN, J.

## IN THE QUEEN'S BENCH.

HILARY TERM, 10 VICTORIA (SATURDAY, FEBRUARY 13, 1847.)

It is ordered, that every attorney residing in the Home District, and not having an office within the City of Toronto, or the liberties thereof, shall have a booked agent in the City of Toronto, conformably to the rule of this Court of Michaelmas Term, 4 Geo. IV., upon whom papers may be served, as is provided in that rule with respect to attorneys not resident in the Home District, and subject to the same consequences, in case of his neglecting to enter the name of himself and his agent in the Crown Office, as directed by the said rule.

(Signed)

J. B. ROBINSON, C. J.

J. B. MACAULAY, J.

J. JONES, J.

A. McLEAN, J.

## IN THE QUEEN'S BENCH.

HILARY TERM, 10 VICTORIA (SATURDAY, FEBRUARY 13, 1847.)

It is ordered, that before any person shall be admitted to defend in ejectment, as landlord, either alone or jointly with the tenant, the rule for that purpose must be obtained on an affidavit of the facts, shewing the nature of his interest in the premises, whether such person shall be the actual landlord, or shall have some other interest to sustain; and that the rule of this Court of Easter Term, 8th Vic., respecting landlords defending in ejectment, be rescinded.

(Signed)

J. B. ROBINSON, C. J.

J. B. MACAULAY, J.

J. JONES, J.

A. McLEAN, J.

## IN THE QUEEN'S BENCH.

---

HILARY TERM, 10 VICTORIA (SATURDAY, FEBRUARY 13, 1847.)

---

Ordered,

1. That a scire facias to revive a judgment more than ten years old, shall not be allowed without a motion for that purpose in term, or a judge's order in vacation; nor, if more than fifteen years, without a rule to shew cause.

2. A scire facias upon a recognizance taken before a judge or a commissioner in the country, and recorded at Toronto, shall be brought in the Home District only; and the form of the recognizance shall not express where it was taken.

3. No judgment shall be signed for non-appearance to a scire facias, without leave of the Court or a judge, unless defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one scire facias.

4. A notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance by the bail or defendant on a scire facias.

(Signed)

J. B. ROBINSON, C. J.

J. B. MACAULAY, J.

J. JONES, J.

A. McLEAN, J.

## QUEEN'S BENCH.

---

SITTINGS ON THE SECOND TUESDAY AFTER HILARY TERM, 10 VIC.

---

Present,—THE HON. CHIEF JUSTICE ROBINSON.

“ MR. JUSTICE McLEAN.

“ MR. JUSTICE JONES.

The Hon. MR. JUSTICE MACAULAY, having sat in the Practice Court during Hilary Term, gave no judgments.

The Hon. MR. JUSTICE HAGERMAN absent from severe illness.

---

## EDWARDS V. HOLMES.

Where there have been two leases between the plaintiff and defendant in replevin, and the defendant avows under the wrong one, the court will allow the defendant to amend at the trial, if the amendment cannot be shewn to prejudice the plaintiff.

Replevin.

The only question in this case was upon the propriety of allowing a certain amendment to be made in the record at the time of the trial.

The defendant avowed under a distress for rent due.

In May, 1840, he leased the premises to plaintiff for five years, to hold from 15th October, 1844, at 25*l.* for the first year and 50*l.* for each of the following years, payable on 15th of October in each year, with a clause for re-entry if the rent should be at any time ninety days in arrear—the lease to be determinable at the end of the third year by either party giving a year's notice.

The defendant had given notice, in order to determine the lease, on 15th October, 1842, but a few days afterwards he agreed to allow the plaintiff to continue to occupy for the remaining two years, at the same rent as before (that is, 50*l.* a-year), the other conditions of the lease remaining the same ; and a memorandum to that effect (not under seal) was indorsed on the lease.

The defendant avowed for a balance of rent due on the 15th October, 1844, as upon a holding under the original demise for five years ; and, conceiving at the trial that he ought rather to have avowed as upon a new demise for two years, from 15th October, 1842, under the agreement indorsed, he applied for leave to amend.

The amendment was allowed, after the lease and indorsement had been read in evidence, and before the case had proceeded further.

The issues on the record were *non tenuit* and *riens in arrear*.

The defendant obtained a verdict, 10*l.* 11*s.* 8*d.* being found due for rent.



*P. M. VanKoughnet* moved for a new trial, on account of the amendment being permitted. He relied upon 12 A. & E. 428; 6 M. & W. 542; 6 C. & P. 618.

*Campbell*, of Kingston, shewed cause.—He relied upon 1 D. N. S. 64; M. & R. 253.

ROBINSON, C. J.—Admitting that the original lease between the parties was at an end, and that the understanding come to afterwards had not the effect of setting up or continuing it, so that the landlord could no longer distrain under that lease, then of course the defendant should have avowed under the other, as he was permitted to do by the amendment at the trial.

I think it was within the competence of the judge at the trial to allow such an amendment.

It could make no substantial difference in the subject of contest between them, if indeed there had been any matter in dispute, which it did not seem there was—the amount of rent and periods of payment were the same. I do not see how it could have prejudiced the plaintiff in any defence which he could have intended to set up, and he has not attempted to shew that he was prejudiced.

The act allowing amendments has been carried much farther than it was on this occasion.

JONES, J.—The only question in this case is, whether the learned judge at *nisi prius* had the power to make the amendment ordered.

The demise stated in the avowry had expired, but the term had been extended by an indorsement on the back of the original lease.

The parties knew well the matters in dispute, and there was no surprise upon the plaintiff, any more than there would be in amending the record in an action upon a promissory note set out in a declaration by a wrong date.

The defendant would know that he gave no such note as that set out, but he would also know that he had given a note to the plaintiff, and but one; and it would not avail him to say that he came into court to defend himself against the note as declared upon.

The question to be asked is, can the party be prejudiced by the amendment? Here he could not, because he knew that the only subsisting lease between himself and the defendant was the one which agreed with the amendment, and which he came prepared to dispute, if there was any answer to be given to an avowry upon it.

It is objected, upon the authority of the case 6 M. & W. 558, that the learned judge had not the power to make the amendment ordered in that case, inasmuch as it introduced a new contract, and would require a remodelling of all the pleas on the record.

When such an effect would be produced an amendment ought not to be made.

But here there could be no surprise, and no alteration was required in the pleadings. I think that the amendment was properly made, and far less questionable than many which have been upheld in the books.

McLEAN, J., concurred.

*Per. Cur.*—Rule discharged.

## BENEDICT V. BOULTON, KIRKPATRICK, CLEGHORN AND SHAW.

An attorney cannot act at the trial of a cause both as *an advocate and a witness*.

It is no ground for a new trial, that the judge at *nisi prius* refused to allow the plaintiff, after he had closed his case, to supply the evidence of a fact he had omitted to prove.

A plaintiff may be nonsuited as to some of several defendants, though judgment by default has been entered against the others.

Assumpsit for wages due to the plaintiff, as an engineer on board of a steamer.

Boulton and Kirkpatrick, two of the defendants, pleaded severally the general issue and Statute of Limitations.

Cleghorn and Shaw, the other defendants, allowed judgment to go by default.

The only evidence to prove the case was the plaintiffs attorney, who being cross-examined swore, that his client had gone to the United States, and he had not seen him for five or six years; that he had brought two former actions for the same alleged debt; that he discontinued the first, because he had joined one person as defendant, against whom he could not prove a case; that he did not succeed in the second action, because he had not regularly discontinued the first, and that he had paid the costs of neither.

The debt was alleged to have been contracted about nine years before, and the defendants were sued as having been shareholders in a small steamer, on board of which the plaintiff was said to have served.

The attorney swore, that any instructions received by him lately to persevere in this action, had been given to him by Cleghorn one of the defendants, who is the plaintiffs brother-in-law.

To take the case out of the Statute of Limitations, the plaintiffs attorney relied wholly upon admissions, stated to have been made to himself by Boulton and Kirkpatrick, within six years.

At the conclusion of the plaintiff's case, the defendant's counsel objected that no evidence had been given to shew that Shaw was any party to the contract, or was in any manner liable.

The plaintiff's attorney, who acted in the double capacity of counsel and witness, then urged the Chief Justice, who tried the cause, to allow him to supply that proof by stating conversations with Shaw, but this was declined, and the plaintiff was nonsuited.

*R. P. Crooks* moved for a new trial without costs, he relied upon 3 T. R. 662; Cowp. 485, as shewing that where some of several defendants allow judgment to go by default, there cannot be a nonsuit as to the rest.

*Cameron*, Solicitor-General, shewed cause: he relied upon 1 Ch. Pl. notes, 50; 1 Esp. C. 135; 5 B. & C. 178; 4 C. & P. 262; 2 M. & P. 18; 4 Taunt. 752; 8 Taunt. 139; Harrison, Dig. 1793; Commercial Bank v. Hughes et al. 3 U. C. Q. B. Rep'ts.

ROBINSON, C. J.—I think the rule should be discharged.

As to the not allowing the plaintiff's attorney, after he had closed his case, without proving Shaw a party to the contract, to proceed to supply that proof, if he could, by making further statements, I am of opinion that that affords no ground for a new trial; that is always a matter of

discretion with the judge at the trial, and the court in banc will seldom overrule the manner in which that discretion has been exercised, and that only for advancing the apparent justice of the case.

But if there was anything wrong done here, it was in receiving the evidence of the plaintiff's attorney to any extent, while he conducted the case as counsel at the trial.

In a late case in England, the court determined that an attorney could not act both as an advocate and a witness upon the trial of a cause reported in 8 Law Times, 197. The same point was determined also in a later case of *Dunn v. Packwood*, 8 Law Times, 371; and certainly the circumstances appearing in evidence upon this trial, shew in a strong light the propriety of the course pursued in England.

It will, I am persuaded, be much for the advantage of the profession to follow the same course here.

As the plaintiff did not prove anything to make Shaw liable, it is now admitted in the argument that he could not recover against those who are sued as joint contractors with him, and who have denied the contract declared on; upon that ground the nonsuit was directed.

It has been contended that he could not properly be nonsuited at the trial, because Shaw himself as well as Cleghorn had admitted themselves to be liable by suffering judgment to go by default, and that under such circumstances the plaintiff could not be nonsuited as to the other defendants.

But the law is clear against the plaintiff in both points. It is not indeed denied, that notwithstanding the judgment by default suffered by Shaw, it was necessary to prove the case against him by evidence at the trial, in order to establish the case against those who have pleaded.

Upon the other point raised, namely, that the plaintiff could not be nonsuited as to one of several defendants, while there is judgment by default against others on the same record, we have lately determined in the case of *Commercial Bank v. Hughes and others* (Michaelmas Term, 1846), that there is now no such rule to be acknowledged.

The nonsuit in such cases is not in regard to the defendant only, whom the plaintiff has failed to prove liable, but he is nonsuited on the action generally.

JONES, J.—From the notes of the evidence, I think the plaintiff shewed by no satisfactory evidence that he was entitled to recover against any of the defendants.

But the question is, whether the plaintiff can be nonsuited, there being a judgment by default against one of the defendants.

In *Hannay v. Smith*, 3 T. R. 662, it was held upon the authority of several cases cited, that in an action of assumpsit against two defendants, there could not be a nonsuit in the cause, in respect of one of the defendants, after judgment for the plaintiff by default against the other. But in the case of *Murphy v. Dolan et al.*, 5 B. & C. 178, in an action on a bill of exchange, the plaintiff was allowed to be nonsuited against one of the defendants, having a judgment by default against the other; and the case of 12 Ad. & El. 745, is conclusive as to the right to nonsuit in this case: an action was there brought against six defendants as acceptors of a bill; the plaintiff failed to prove that one of the defendants accepted; on a motion for a nonsuit in term upon exceptions taken at the trial, a

nonsuit was entered ; three of the defendants had allowed judgment to go by default.

McLEAN, J., concurred.

*Per Cur.*—Rule discharged.

#### BENTLEY V. WEST.

When an award fixes no day for the payment of money, a party suing for the sum awarded, is not as a matter of right entitled to *interest*.

A variance in the names of arbitrators as stated in the declaration, the agreement and award, is no ground for a nonsuit.

The plaintiff sued in debt on an award made on the 27th September, 1831, setting out a submission by mutual agreement, under seal, made on 24th September, 1831, of all matters in difference, and among these a suit brought by the plaintiff against the defendant.

The award directed that the defendant should pay to the plaintiff 16*l*.

The submission in the agreement was stated to have been made to the award of Joseph Tomlinson, Joseph Reesor, Christian Reesor, James Sherrard, Joshua Wickson and John Butts.

The defendant pleaded, denying the submission to be his deed.

Second—No award made.

Third—That the arbitrators did not make, publish, and give their award in writing on or before the day limited, &c.

The agreement to submit was produced and proved. It referred all differences to Joseph Reesor, Joseph *Tumbleson*, Christian Reesor, John Butts, Joshua Wixon and James *W. Sharrard*.

The award was subscribed by Joseph Reesor, Joseph Tomlinson, Christian Reesor, John Butts, Joshua Wixon and James *W. Sharrard*.

The jury gave a verdict for 50*l*. 10*s*. to plaintiff. It was proved on the trial that soon after the award the defendant left this district, and had been residing for fourteen years and more in the District of Gore, which accounted for plaintiff's not having sooner sued for or demanded payment.

The defendant objected to the variances in the names of the arbitrators as stated in the declaration, the agreement and the award.

*R. P. Crooks* moved, on leave reserved at the trial, for a new trial, or to reduce the verdict by deducting the sum allowed for interest ; or for a nonsuit. He cited 3 Campb. 468 ; 1 Saund. 524.

*A. Wilson* shewed cause : he relied upon Com. Dig. Fact, E. 3 ; 1 Tyr. 3 ; Leach, C. C. 861 ; Willes, 5 ; 7 Dowl. 503. As to the right to interest he cited 9 Bing. 605 ; 5 B. & Ald. 518.

ROBINSON, C. J.—With regard to interest. If the award had directed the money to be paid on a certain day, then after that day interest might have been allowed (3 Campb. 468), but there was no day set here for the payment.

We must now in these cases have reference to our statute of 7 Wm. IV. ch. 3, sec. 20, and we cannot in my opinion hold that the jury were bound to give interest on the sum awarded, in other words that the plaintiff had a legal right to it ; we cannot therefore, as the matter now stands before us, give interest by our decision as being claimable of right : but for the sum awarded without interest, I see no reason why the



plaintiff should not recover. The variances in setting out the names of the arbitrators, are not such in my opinion as to create any difficulty.

JONES, J.—The question is, whether the plaintiff is by law entitled to interest on an award.

Upon an award the jury may in their discretion allow interest under our statute 7 Wm. IV. ch. 3, sec. 20, but it is not a matter of right.

In 3 Campb. 468, Lord Ellenborough held that when money was awarded to be paid on a certain day, interest ought to be allowed from that day, if payment was then demanded at the place appointed.

Here no demand is proved.

In this case I think the interest recoverable in the discretion of the jury, and if it had been submitted to them in that way, the verdict would have been right, but interest is not by law due.

McLEAN, J., concurred.

*Per Cur.*—*Postea* to plaintiff, 16*l.*

#### DOE DEM. BURRITT V. DUNHAM.

Where a tenant overholds for a considerable time, and the landlord asks him to pay rent and he refuses to do so, he may be ejected without a notice to quit, or a demand of possession.

Ejectment for lands in Augusta.

The plaintiff made title under a conveyance from the executors of the late George Langley, Esq., made 3rd December, 1845.

At the trial he produced a lease (19th June, 1844), whereby the executors of Langley had demised the land to the defendant for three months from the date.

On the part of the defendant it was proved, that having remained in possession after the expiration of the three months, and after he had paid his rent for those three months according to the lease (7*l.* 10*s.*,) one of the executors who made the lease, demanded through his agent the rent for another quarter, and it was objected that this demand of rent for a period during which defendant was holding over entitled him to notice to quit, or to a demand of possession, though no rent was paid, and though it was not proved that the defendant promised to pay rent—nothing more than that the lessors had demanded it through their agent.

A verdict was given for the plaintiff, with leave to the defendant to move for a nonsuit.

*J. H. Hagarty* moved accordingly: he relied upon 3 Bing. 361; Adams on Eject. 107, 121; 10 E. R. 261; 2 Esp. C. 216; 1 B. R. 596; 5 T. R. 471; 1 H. B. 97.

*R. P. Crooks* shewed cause: he relied upon 2 Esp. C. 716; 1 H. B. 311; 6 T. R. 220; Plowd. 133.

ROBINSON, C. J.—The case of *Doe dem. Godsell v. Inglis*, 3 Taunton, 54, is much in principle like the present, and would seem to dispense with the necessity for any notice or demand in such a case.

A demand of rent when none had been agreed to be paid, and when none was paid or promised in consequence of the demand, ought not to prejudice the landlord.

It only shewed his willingness to create anew the relation which had expired, if the tenant were disposed to do so: but when the tenant paid

no attention to the demand, that was evidence that he repudiated a tenancy; and if so, he should be in no better situation than if he had simply held over without anything having passed on the subject.

The case cited from 10 E. R. 261, differs much from this, because there had been payment of rent to the plaintiff for a very long period of time, without any other relation subsisting than there was when the ejectment was brought.

I have looked into all the cases cited, and do not find that we can regard the defendant otherwise than as a tenant at sufferance, upon whom the plaintiff was at liberty to enter at any moment, and this being so, we are not warranted, I think, in holding that any notice or demand of possession was necessary.

If the defendant had been in treaty for a lease, or if we could say on any clear ground, that he was lawfully in possession by the landlord's permission, then there could be no recovery without a demand of possession.

But all that appears is, that the defendant had been allowed to overhold for a considerable time, and that his landlord had asked him to pay rent, which he would not do.

I see nothing to imply, as against the landlord, his permission that the defendant should continue to occupy, unless he would agree to pay rent; and as he did not choose to do this, there would be no reason in holding him, nevertheless, as standing on a different ground from other overholding tenants.

JONES, J.—I consider the defendant in possession at the expiration of the lease in the same position as a tenant after forfeiture, or after a regular notice to quit.

In either case the lessor of the plaintiff is entitled to enter, unless he has waived his right by some act subsequent to the time of forfeiture, or the expiration of the term, which shewed that he still regarded the defendant as his tenant and entitled to retain possession.

It was formerly considered, that the *acceptance* of rent for a period subsequent to the expiration of the lease, created a new tenancy or was to be regarded as a continuation of the old tenancy. But in Cowp. 243, it was determined that the mere acceptance of rent by a landlord for occupation, subsequent to the time when the tenant ought to have 'quitted according to the notice given him for that purpose, is not of itself a waiver on the part of the landlord of such notice, but matter of evidence only, to be left to the jury under the circumstances of the case.

It having been taken by all at the trial of the case that such receipt of rent would be a waiver of the notice to quit, a verdict was given for the defendant by the direction of Lord Mansfield, he having himself doubts as to the correctness of his ruling, and desiring the matter to be settled, his lordship requested counsel to move for a new trial, which after argument was ordered, the question being "whether sufficient matter appeared in point of law to prevent the lessor of the plaintiff from recovering; it clearly appearing that a quarter's rent had accrued subsequent to the demise which had been received by the plaintiff." But in 6 T. R. 220, it was held by Lord Kenyon that if the landlord in such a case receive the rent, *quasi* rent, it is a waiver of the previous notice to quit, and not merely evidence of intention to go to the jury.

In the case under consideration the question is, whether a demand of rent by the lessor of the plaintiff, for a period accruing after the determination of the lease, is sufficient in point of law to prevent the lessor of the plaintiff from recovering in this ejectment.

If a receipt of rent, not clearly as rent, is not sufficient (Adams on Eject. 140), but is a circumstance to be left to the jury, from which they may infer that the tenancy still subsisted at the time of payment, *a fortiori* a demand of rent cannot be regarded as sufficient, and I think is not a circumstance to go to the jury from which they may find an existing tenancy.

A distress for rent is clearly an unequivocal waiver of a notice to quit (Plow. 113). It is an act not to be qualified (1 N. B. 311), and Mr. Justice Gould says, in the mere acceptance of rent, the *quo animo* is to be left to the jury, but in case of a distress, no question of intention *could* be so left.

In a case of forfeiture for non-payment of rent or any other condition, if the landlord, having notice of the condition broken, *accepts* the rent which is due after condition broken, it is a waiver.—Cro. El. 553, 572; 6 B. & C. 519.

From all the cases it appears to me that a demand for rent accruing after the end of the term, cannot waive a landlord's right to bring ejectment; it must be a payment of rent by the tenant, and an acceptance by the landlord as rent; there must be a concurring act on the part of each.

Upon the argument it was insisted, that the occupation of the defendant, from the expiration of the lease up to the bringing of the action, should be regarded as an admission on the part of the lessor of the plaintiff, that the defendant was still holding as tenant, under the authority of the cases cited in 2 Esp. N. P. Cases: but I think not.

The lease expired, and no rent was paid to the executors and trustees of Langley, and they assigned to the lessor of the plaintiff, and no evidence was given of any new connection between the plaintiff and the defendant up to the bringing of the action.

Is the defendant to be regarded for the first year after the expiration of the lease as tenant from three months to three months, and from thence as tenant from year to year? I see nothing which entitles the defendant to be regarded in any other light than as a trespasser after the expiration of the lease.

McLEAN, J., concurred.

*Per Cur.*—Rule discharged.

---

DOE DEM. MAURICE PIQUOTTE V. BARTHOLOMEW PIQUOTTE.

Construction of instrument—as to its operation by estoppel.

Ejectment for west half of No. 5, in the 11th Concession of Emily.  
The plaintiff made title as follows:

He produced a patent, dated 27th August, 1840, by which the crown had granted this land to Bartholomew Piquotte, the defendant. He then proved a deed of bargain and sale, 20th May, 1843, from the defendant to one Daniel Piquotte, in common form, with covenants; and he proved



a writing, under seal, from Daniel Piquotte, on the 11th July, 1842, in these words:

"An agreement between Daniel Piquotte, of the Township of Emily, in the Colborne District, yeoman, of the one part, and Maurice Piquotte, of the aforesaid township, of the other part, witnesseth, that the aforesaid Daniel Piquotte, in consideration of 100%. of lawful money of Upper Canada, by wheat and rent to me in hand paid at or before the sealing and delivery hereof, the receipt whereof I do hereby acknowledge, have granted, sold, bargained and assigned, and by these presents sell for ever, the aforesaid Maurice Piquotte two hundred acres of land being composed of lot No. 5, in 11th Concession of Emily; and by virtue of letter of attorney,

"I, the aforesaid Daniel Piquotte, bind myself, my heirs and assigns, to give up the quiet and peaceable possession of the aforesaid two hundred acres of land, free from any incumbrance whatsoever, and to give a transfer-deed of the aforesaid lot, as soon as he requires it, unto the aforesaid Maurice Piquotte, his heirs, executors, &c., against me, the aforesaid Daniel Piquotte, and against every other person or persons will for ever warrant and defend by these presents. I bind myself, my heirs, &c., under the penalty of 200%. of lawful money of Upper Canada, for the due performance of the said bargain and agreement; whereof by these presents hereunto I put my hand, &c."

This writing was witnessed by the defendant, Bartholomew Piquotte, and another person.

There was no proof of any consideration paid for either transfer, at the time of the execution of the deed or agreement from Daniel Piquotte to the lessor of the plaintiff.

Bartholomew Piquotte, the defendant, was living upon the land, and had been living there for about two years. Before that time no one had occupied it.

It was agreed, that upon this evidence a verdict should be rendered for the plaintiff, subject to the opinion of the court whether a nonsuit should not be entered.

*Cameron*, Sol. Gen., moved to enter a nonsuit on the leave reserved. He contended that the instrument given by Daniel, in 1842, to the plaintiff, was a mere agreement, and not a conveyance, and could have no legal operation on the estate; that the binding himself to give a conveyance at a future time, shewed that no present conveyance was intended. It was clear, at any rate, that there could be no estoppel under the deed as to the defendant, because he did not *claim under* Daniel.—3 A. & E. 2.

*A. Wilson* shewed cause. The deed of 1842 did operate by way of estoppel. It was in the first place an absolute conveyance, granting to the lessor of the plaintiff an estate for life; and then an agreement to give a fee-simple at some future time. Viewing it in this light, there was nothing inconsistent between the latter and former part of the deed. There was no acknowledgment by Daniel on the face of the instrument that he had no title; he merely bound himself to convey the reversion.—6 M. & G. 173; 1 P. W. 293; 4 A. & E. 809.

*ROBINSON*, C. J.—It is impossible to say, from anything that was proved at the trial, what may be the real justice of the case between the parties.



There has evidently been some shifting of title among them, upon considerations and for purposes not explained.

It is as probable, therefore, that the effect of a decision according to the strict rule of law, which in such cases must be adhered to, may be as much in support of the justice of the case as against it. At all events, it is left for us to say what is the legal effect of the writing produced.

It is clear, that it cannot avail to create an interest or title by estoppel, because it is inconsistent and inconclusive in its nature; whereas a deed, to support a claim by estoppel, must be direct and precise; it must profess absolutely and clearly to convey an interest at the time of its execution. But this deed is an agreement, rather than a conveyance; it carries its infirmity on the face of it.

It was ingeniously attempted to place the paper in the light of an absolute conveyance to the lessor of the plaintiff of the life estate, with an agreement to make at a future time, upon request, a title to him in fee simple; but I think we cannot properly give it that construction.

The instrument begins and ends as a mere agreement, and the party binds himself to it by a penalty in case of failure.

It is difficult indeed to tell what may have been meant, and that alone would disable us from treating it as a deed concluding the party by estoppel; because there the language and intent must be free from all doubt, estoppels being so far discountenanced by the law, that they are not to be extended by construction, but must arise from the obvious, indisputable legal effect of the deed; and besides, this deed can be no estoppel in regard to this defendant, who is not a party to the deed, nor claims in any manner under it.

Then, as to the facts proved *dehors* the deed. That Daniel Piquotte had no title when he made this deed to Maurice Piquotte, is certain. The defendant, Bartholomew, was in possession at the time, and was privy to this assumption and attempt by Daniel to transfer the land, which at the time belonged to Bartholomew himself, and witnessed the deed.

If it was to serve any purpose of his that the transaction was entered into between the other two, Daniel was with his assent acting on his behalf in the matter, and having before agreed with him for the land, was thus, with his knowledge and acquiescence, appearing to deal with it as his own, and to sell it to Maurice. Then it was plainly dishonourable in the defendant to change his ground now, and raise the objection that the deed could convey no interest; for that he had not at that time conveyed to Daniel, though he has conveyed to him since, thus setting up Daniel Piquotte's title against that of Maurice, to whom he had seen Daniel make such a deed.

But we should not be warranted in assuming that the defendant knew the contents of the paper which he witnessed.

The whole transaction, unexplained as it is by any affidavits of the parties, has much the appearance of its being some convenient arrangement, made under an emergency, to give a mere colourable title to Maurice Piquotte, which the latter may now be endeavouring to use as a *bonâ fide* transfer; and this seems the more probable from Bartholomew having remained all the time in possession.

However this may be, I can discover no principle consistent with the grounds on which actions of ejectment must be disposed of, on which I can say, that Daniel Piquotte's agreement has the legal effect of creating a title by estoppel in favor of the plaintiff, and therefore consider that the rule must be made absolute.

JONES, J.—I think a nonsuit should be entered upon the leave reserved at the trial.

The deed from Daniel to the lessor of the plaintiff can only operate by estoppel; and it is contended on the part of the defendant that it can have no such operation.

It purports to be an *agreement*, by which Daniel, for the consideration of 100*l.*, grants, sells, bargains and assigns to the lessor of the plaintiff (not in fee) the land in question, by virtue of a power of attorney; and "binds himself, his heirs and assigns, to give up the peaceable and quiet possession of the land, free from any incumbrances whatever, and to give a transfer-deed of the lot as soon as he requires it, unto the aforesaid Maurice Piquotte, his heirs, executors, administrators and assigns, against him the aforesaid Daniel Piquotte, and against every other person or persons, will for ever warrant and defend by these presents. I bind myself, my heirs, executors, administrators and assigns, under the penalty of 200*l.*, for the due performance of the said agreement."

Daniel Piquotte, at the date of the deed, had no estate in the premises; he does not by the deed profess to have any, and it is an agreement on his part to make a deed in fee to the lessor of the plaintiff. It most certainly cannot operate by way of estoppel.

McLEAN, J., concurred.

*Per Cur.*—Rule absolute for a nonsuit.

#### BACON v. McBEAN ET AL.

After an unsuccessful demurrer, the court, in the exercise of their discretion, will sometimes refuse to allow a party to amend and plead to the action.

Action on foreign judgment.

Plea by both defendants, that one of them was not summoned, and had no notice or opportunity of answering to the action in the foreign court.

Replication, setting out a statute of the foreign country, under which the plaintiff could legally proceed as he did to obtain judgment.

Demurrer to that replication.

The court gave judgment on the demurrer for the plaintiff, on the ground that the plea was no defence as pleaded.

Rule for judgment thereon was taken out and served, notice of trial given, and the record carried down to trial, but not tried, because there was not time to finish the civil business. It was necessarily made a *remanet*.

No application was made to amend till this term (Hilary), when one defendant (the other having died) moved to amend, producing an affidavit of merits, but alleging only as his merits that he had a set-off, on which, if he could have advanced it on the trial in the foreign court, judgment would have been in his favour.

*Cameron*, Sol. Gen., moved to be allowed to amend and to plead the set-off.

*Vankoughnet* shewed cause. He referred to *Counter v. Hamilton* (in our own court).

ROBINSON, C. J., delivered the judgment of the court.

It is urged, as there has been no trial in fact, and as the plaintiff's own pleading (the replication) was bad, and he succeeded only on account of the defendants' bad plea, both should now be permitted, if they desire, to amend. But there is not much weight in that argument; because the plaintiff's declaration remains unexcepted to, and is sufficient for his purpose. If his replication to a bad plea was itself exceptionable, still he has no longer any occasion to rely upon or make use of it, after the defence to which it was intended as an answer has been adjudged insufficient.

We think, on the whole facts before us, that this is not a case in which it would be a proper exercise of our discretion to allow the defendant to amend his pleading.

He waived the opportunity of pleading a set-off when he put in his other plea, and was content to rest upon that.

He will not be barred as to his set-off by a recovery in this action, and no reason is shewn why his partner, the other defendant, who, it is admitted, was duly summoned, and had opportunity to defend the action, did not advance the set-off, which, by the statements made in the affidavit before us, appears clearly to have been for a debt due to the two defendants as co-partners.

The delay in moving, added to these considerations, induces us to decline granting the permission to amend, especially as the amount is not very large.

We think it would tend to establish a looseness of practice, which would be inconvenient.

*Per Cur.*—Amendment refused.

---

CUVILLIER ET AL. V. BROWNE.

Letters written by the parties to a suit, like receipts and other admissions, are always open to explanation, unless, under the particular circumstances of the case, they may have led to conduct in third parties involving loss to them, by reason of their having acted upon the faith of such letters.

The plaintiffs declared against the defendant in an action on the case, setting forth that the defendant was a wharfinger and forwarder, and that plaintiffs had delivered to him, as such forwarder, 200 barrels of pork, to be forwarded from Toronto to Montreal, to the order and for the use of the plaintiffs, for reward, &c.; and that, contrary to his duty as such forwarder, the defendant did not forward the pork to Montreal, to the order and for the use of the plaintiffs, but negligently and improperly forwarded it to the order and for the use of certain other persons, Messrs. Kelly & Co., whereby it became wholly lost to the plaintiffs.

The declaration contained also a count in trover.

The defendant pleaded, 1st, the general issue.

2ndly, That the plaintiffs did not deliver the pork to him, as in the 1st count stated.



3rdly, To the count in trover—that the plaintiffs were not possessed of the pork as of their own property, as in that count stated : which plea was specially demurred to.

The plaintiffs were commission merchants, residing in Montreal. It appeared that they were in a course of correspondence, in the winter of 1845, with Messrs. Kelly & Co., who were merchants in Toronto, and who desired to obtain advances in money from the plaintiffs, in order to enable them to purchase produce in Upper Canada, to be sent to the Montreal market.

The plaintiffs were unwilling to make such advances, until they had the receipts of some forwarder or warehouseman in Toronto, for produce stored with him, but when covered by such receipts, they were willing to accept Messrs. Kelly & Co.'s drafts.

In December, 1845, Messrs. Kelly & Co. transmitted to them the receipt of this defendant, Browne, who is a forwarder and wharfinger in Toronto, for 100 barrels of pork; and in February, 1846, another receipt of the defendant, for 80 additional barrels. These receipts were nothing more than receipts by defendant for so much pork from Messrs. Kelly & Co., for *storage*. They ran in this form:—"Toronto, "15th December, 1845. Received from Messrs. W. C. Kelly & Co., per carters, for *store*, the following property, in good order." And the pork is described as marked "W. C. K. & Co."

In the plaintiffs' letters to Messrs. Kelly & Co., acknowledging these receipts, they spoke of them as Browne's receipts for pork, "subject to their (plaintiffs') order," though the receipts on the face of them made no mention of the plaintiffs, nor was there anything proved on the trial which could shew that the defendant had any knowledge of the plaintiffs' interest in the transaction, until the 28th May, 1846, when the plaintiffs wrote to the defendant, informing him that they held his receipts from Messrs. Kelly & Co., of Toronto, for 180 barrels of pork, and also from one Coons, another merchant in Toronto, for 200 barrels of flour; and they add, "We are anxious to know what "has become of this property, not having received it. Would you "favour us with your opinion of Messrs. Kelly & Co., we having come "under advances for them, and as yet received no property."

The defendant, on the 9th day of June, 1846, sent this answer to the plaintiffs:—"I shipped 175 barrels of pork for you on the "21st ultimo, from W. C. Kelly & Co., and 200 barrels of flour on "the 11th of the same month, from N. J. Coons, all of which I hope "has reached you safely. I would have written you sooner, but I "wanted to see Mr. Lynch, in consequence of the discrepancy in the "receipt, which is quite right. 175 barrels of pork is all I had to "ship for Messrs. Kelly & Co."

It was not denied that the pork was actually forwarded by the defendant to W. C. Kelly & Co.'s order, in Montreal, on 21 May, 1845; and it was not proved, that at that time the defendant knew anything of the plaintiffs having made advances to Messrs. Kelly & Co., on account of the pork; but the plaintiffs' case was rested wholly on the defendant's letter of the 9th of June above mentioned.

The pork, it appeared, did arrive in Montreal, consigned to W. C.



Kelly & Co., and was received by one of the partners, who, instead of allowing it to pass into the plaintiffs' hands as security for the advance they had received, took it to another merchant, as the property of R. Lynch & Co., and received a new advance upon it of 600*l*.

The learned judge, at the trial, laid stress upon the defendant's letter, as tending strongly to establish his liability; and the jury found for the plaintiffs, 530*l*. damages.

*H. Sherwood*, Q. C., moved for a new trial on the law and evidence, and for misdirection, and on an affidavit of the defendant, in which he swore, that until after he had forwarded the pork to Montreal, he never had received any intimation that these plaintiffs had any claim upon it whatever, or had made advances to Kelly & Co. He contended there had been a misdirection on the part of the learned judge, in treating the letter of the 9th June as conclusive against the defendant. It was clearly open to explanation, in the same way as all receipts and admissions of parties are, where they have not occasioned loss to third parties, acting upon the faith of expressions used. Here no possible loss could have resulted to Messrs. Cuvillier & Co. from the letter. The advances were not made on account of it, but long before it was written; and it would be the grossest injustice to hold the defendant estopped by an assertion in a letter inadvertently made, and which he could satisfactorily shew was not in accordance with the truth.

*Cameron*, Sol. Gen., contended the defendant could not dispute the plaintiffs' right to the pork, after his letter of the 9th of June, calling it theirs. He cited 10 Bing. 246; 3 B. & P. 582; 3 Taunt. 483; 2 Camp. 639, 36; 8 T. R. 330; 4 B. & C. 219; and relied upon these cases as shewing that the defendant must be taken as receiving the goods to carry for the plaintiffs. The plea admitted that they were delivered in order to be conveyed to Montreal, as stated in the declaration; the defendant could not therefore on the pleadings set up the defence he did.—Peake's C. 49; 4 T. R. 260; 5 Burr. 2825.

*Sherwood*, in reply.

The case of 10 Bing. 246, upon which the Solicitor-General principally relied, was very different from this. There an order was given to the wharfinger to deliver the goods to *the plaintiffs*; here, Kelly & Co. had done nothing to disable themselves from disposing of the goods as they pleased: they were in the wharfinger's hands, subject to their control; and after they were forwarded to Montreal, Kelly & Co. could have stopped them *in transitu*, and changed their destination at any time before they reached the plaintiffs.

As to the defence urged at the trial not being available on the pleadings, the 2nd plea to the special count clearly opened such a defence. It was there expressly denied that the plaintiffs had delivered to the defendant the pork to be forwarded to them at Montreal, as stated in that count.—2 C. M. & R. 1; 13 M. & W. 103; 14 M. & W. 403.

ROBINSON, C. J., delivered the judgment of the court.

It is clear, that as between W. C. Kelly & Co. and the plaintiffs, the justice of the case is wholly on the side of the plaintiffs, whose

confidence has been greatly abused; but as regards the defendant Browne, nothing was shewn at the trial which should in law or justice render him liable to make good the loss, unless the plaintiffs are right in contending that his letter of the 9th June imports an admission which he cannot be allowed to contradict or explain, that he had held the pork for the plaintiffs, having received it to be forwarded to them, and, consequently, that his consigning it to Messrs. W. C. Kelly & Co. was a breach of duty.

We are all of opinion that the verdict ought not to stand.

The learned judge's first impression at the trial was not, in our judgment, the correct one. There was nothing in the circumstances under which the defendant received the pork, which could establish any privity between him and these plaintiffs, or render him liable to them on an implied contract.

The error at the trial was in treating the letter of the defendant as incontrovertible evidence that he had held the pork subject to the plaintiffs' order, or for their benefit; and the learned judge, upon more deliberate consideration, takes the same view of the case that we now do.

Whatever may have been the occasion of the defendant's so expressing himself, in his letter of the 9th of June, as to convey an apparent admission that he had held the pork to the plaintiffs' use, and had shipped it for them, nothing could be more manifestly unjust than to hold him precluded from shewing what the real facts were.

This is not the case of a warehouseman having plainly agreed to hold property for a third party, in consequence of a transfer of which he has had notice. It is clear, on the face of the evidence, that the defendant took the pork in the common course of business, to be stored merely; and it is equally clear, from the plaintiffs' correspondence with Kelly & Co., that they required nothing more than to be satisfied that the latter had purchased and stored pork to the amount of the sum which they proposed to draw for.

They might very naturally have imagined that Kelly & Co. would have informed the warehouseman that the pork was to be held subject to the order of the plaintiffs; but they probably had no suspicion that a direct fraud would be practised upon them, when the pork should be forwarded to Montreal, and they seem therefore to have been satisfied when they got the defendant's receipts, though these imported nothing more than that Kelly & Co. had so much pork in the defendant's store.

When they found that the pork did not arrive, they became uneasy, and wrote to the defendant, giving then what appears to have been the first intimation to him, that the plaintiffs had any connection whatever with the transaction; but that information came too late to be of any use to the defendant, for the pork had been already shipped, and shipped, as it really appears, in entire ignorance that the plaintiffs had any claim upon it, or had made any advances in respect of it, or that either they or Kelly & Co. had ever intimated or expected that the pork was to go into their hands.

When the defendant received the plaintiffs' letter, having many days before shipped the pork, and having no longer any power of controlling its destination, his correct and natural reply would have been, that he

had shipped the pork to which the plaintiffs seemed to refer, to the address of Messrs. Kelly & Co., who had stored it with him, and by whom he supposed it would be delivered or had been delivered to the plaintiffs upon its arrival; but I think that when we consider all the circumstances, the defendant cannot justly be looked upon as meaning anything more by what he did write.

He says, "I shipped 175 barrels of pork *for you*, from Messrs. Kelly & Co.;" and as it is not in any manner shewn that the defendant had any reason to imagine that Kelly & Co. were meditating a fraud, or meant to deceive the plaintiffs, he might very naturally adopt the plaintiffs' own statement, and suppose that the pork had been in fact forwarded to Messrs. Kelly's address in Montreal, for them; in other words, that there was a fair understanding between them, consistent with what the plaintiffs had stated, and that they would get the pork on its arrival. He wrote with no other end in view than to inform the plaintiffs that the pork they were enquiring about had gone down.

It would be manifestly unjust to hold the defendant liable for what Kelly & Co. did in fact do with the pork, when it arrived; for the plaintiffs' letter was written too late to afford the defendant any information which could govern his conduct: and what is relied on as an admission in the defendant's answer, could very clearly not have been relied upon by the plaintiffs, in their dealing with Kelly & Co.; so that it cannot with any reason be said, that they made their advances upon a confidence created by that admission.

It is quite impossible that any case can be cited, which would shew this defendant to be liable upon such a statement of facts.

The defendant, it is clear, alluded to the pork as having been forwarded for the plaintiffs, in no other sense than he alluded, in the same letter, to the flour which he had stored for Mr. Coons, and respecting which the plaintiffs had also made enquiries.

He supposed, no doubt, on reading the plaintiffs' letter, that both were for them, because they said so, and because he had sent both to Montreal, and because, as we may presume, he took it for granted that the parties were acting fairly by each other, and would do what they ought. Coons did so, it appears, and the plaintiffs got their flour. Messrs. Kelly & Co. did not give their pork the right direction, when it arrived in Montreal; and the plaintiffs, consequently, did not get it, as they were entitled to expect.

This defendant, for all that appears, had the same connection with one parcel of the goods as with the other. He naturally spoke of both as being shipped for the plaintiffs, because their own letters shewed him that the plaintiffs and the owners had been in correspondence about these goods, with that view. That seems to be all that he knew of the matter.

The expression he used turned out to be true as regards the flour, for the plaintiffs got it. He had as good reason for supposing it to be correct in regard to the pork. It was a natural expression of the defendant, that he had shipped the pork for them, when he had shipped it to Montreal, for Kelly & Co., who, if the plaintiffs' information was correct, had engaged to deliver it to them. But to make him a guarantee for Kelly & Co.'s fidelity to their agreement, upon anything



that was proved in the case, would be a strange perversion of right. It could only be done upon the principle, that whenever a person uses an expression even in relation to a past transaction, over which he has no longer a control, it must be conclusive against him, whether it be true or untrue, whether made ignorantly and under mistake, or deliberately and with knowledge of the facts.

Receipts and other admissions of parties are always open to explanation, unless under particular circumstances, as where they have led to conduct in other parties, involving loss to them, by reason of their having acted upon the faith of such admissions: or unless they can be treated all the way through as conclusive.

This clearly is not such a case. There is nothing in the whole evidence to shew that Kelly & Co. had parted with their control over the goods, while they lay in the defendant's storehouse; nothing to prevent their taking them out of his hands, for any purpose. And after all, taking the defendant's letter of the 9th of June in its strictest sense, it only stated as a fact, that the defendant had shipped 175 barrels of pork for the plaintiffs from Kelly & Co.; it amounted to no assertion that he had shipped it under circumstances which deprived Kelly & Co. of all further control over it, so that they could not stop it *in transitu*, or change its destination at any time before it actually got into the plaintiffs' hands.

It was contended on the argument, that it was not open to the defendant, under the pleadings, to set up the defence that the goods had not been delivered to him by the plaintiffs, to be forwarded to their order at Montreal, and that he had not wrongfully sent them to Kelly & Co. But the 2nd plea to the special count expressly denies that the plaintiffs had delivered to him the pork, to be forwarded to them at Montreal, as stated in that count: and unless the defendant's letter of the 9th June should be held (which we think it cannot be) to estop the defendant absolutely from shewing the truth, it is plain, upon the evidence, that instead of the pork having been delivered by the plaintiffs, to be sent to them in Montreal, it was delivered by Kelly & Co., merely to be stored, and subject therefore, of course, to their future orders.

*Per Cur.*—Rule absolute for new trial.

#### THOMAS, SHERIFF, v. WILLIAM JOHNSTON AND MOSES JOHNSTON.

A sheriff, wherever there is an *adverse* claim to goods, as between the execution debtor and a third party, may take an indemnity bond from either one or other or both the parties.

Upon an indemnity bond to the sheriff, the obligors must save the sheriff harmless, by taking the defence of any action against him upon themselves; and judgment against the sheriff is conclusive against the obligors.

Notice to the obligors by the sheriff of his being sued, is not necessary to give him a right of action against them.

Debt on bond.

Verdict for plaintiff, £50.

The plaintiff, as sheriff, had a *fi. fa.* delivered to him, to be levied on the goods and chattels of William Johnston, one of the defendants; and seized under it three horses, believing that they belonged to the debtor.

The other defendant in this suit (Moses Johnston, brother of the



debtor), claimed the horses as his; and, upon the representations made to him by the two, the sheriff consented to abandon the levy and return *nulla bona*, provided they would indemnify him against the consequences, which they agreed to do, and for that purpose they gave him the bond of indemnity now sued on.

The plaintiff in the *fi. fa.* afterwards sued the sheriff for a false return.

The sheriff pleaded the *general issue*, and was condemned in the action and compelled to pay 44*l.* 7*s.* 3*d.*, damages and costs; and had in consequence brought this action on his indemnity bond.

The defendants endeavoured to defeat his recovery on two grounds.

They objected that the goods were in reality the goods of William Johnston; that the sheriff, therefore, ought not to have abandoned the levy; that in doing so he was guilty of a breach of his public duty; and that the bond taken by him was on that ground illegal and void.

They objected, in the next place, that the recovery against him was by collusion between him and the plaintiff in the *fi. fa.*, and by the voluntary act and consent of this plaintiff, and that the goods were really the goods of Moses Johnston.

Pleas framed to let in these defences were upon the record.

The bond was set out in oyer, and is in the usual form, reciting that the sheriff had seized the horses "as being the goods of William Johnston, "and that Moses Johnston claimed them as his property, and had "applied to the sheriff to abandon the said levy, and to return to the "said Moses Johnston the horses so seized, on being properly indemnified, which the sheriff had agreed to do:" and the condition was, that the obligors "should save harmless and keep indemnified the sheriff, "from and against all manner of actions brought or to be brought against "him, by reason of the abandonment of the said levy, or for or by reason "of making a return of *nulla bona* to the said writ; and from all costs, "charges, damages or expenses he might be put to on account of the "causes aforesaid, or any or either of them."

At the trial, the defendants' counsel contended that the general issue pleaded by the sheriff, in the action against him, merely denied the return of *nulla bona*, and did not bring in question the property in the goods; that they were in fact the property of Moses Johnston; and that the sheriff did not defend himself as he might, or he would not have failed in the action. He did not, however, assert that the sheriff had knowledge of the fact, or that he had supplied him with the means of proving it.

The learned judge considered the recovery against the sheriff conclusive upon the defendants, and directed a verdict against them.

*R. P. Crooks* moved for a new trial on the law and evidence, or to enter a verdict for the defendants, or for a nonsuit: he relied upon 3 Doug. 240.

*A. Wilson* shewed cause. He cited *Watson on Sheriffs*, 195; 1 Saund. 161, n. 1; *Powell v. Boulton* and *Ballard v. Haight*, in our own court.

ROBINSON, C. J.—There is no pretence, in my opinion, for holding that the verdict is otherwise than consistent with the law and the justice of the case. The case of *Wright et al. v. Lord Verney*, 3 Dougl. 240, was relied upon in support of the objection, that the bond is void, being corruptly taken to indemnify the sheriff against the consequence of a

breach of duty; but in that case the bond plainly imported that the goods were the goods of the debtor, and therefore the abandoning the levy was a matter of pure indulgence improperly granted to him, at the expense of the plaintiff, not a forbearance in consequence of a claim of property advanced by a third party.

The case proceeded on that distinction; and if it were clear that upon the authority of that case, a defendant must under such circumstances be permitted to plead as his defence against the bond, that it was taken by the sheriff contrary to his duty, though in compliance with the defendant's desire, still it has no application in this case.

This is a proper indemnity bond in the ordinary form, reciting an adverse claim to the goods.

The sheriff, in such case, may take an indemnity from either of the parties, plaintiff or defendant, and may act accordingly.—Watson on Sheriffs, 195.

As to the other point—it is clear that upon an indemnity bond like the present, the obligors must at their peril save the sheriff harmless, by taking the defence upon themselves, or they must abide the consequences: notice is not necessary, in order to give the party indemnified a right of action.

If they shew a fraudulent and collusive recovery against right, by connivance of the sheriff, that is another matter; but here nothing of that kind was attempted.

This subject was so much discussed in this court, in the case of Powell v. Boulton (2 U. C. Q. B. R. 487), that we need only refer to that for the grounds of our opinion; and the case of Ballard v. Pope, in this court (3 U. C. Q. B. R. 317), is material to be referred to, upon the defence that the sheriff acted illegally in taking the bond.

JONES, J.—No authority has been cited, nor do I think any can be produced, to shew that the sheriff's proceeding was fraudulent and the bond void, any more than a bond from the plaintiff in the original action to indemnify the sheriff in proceeding to sell the property notwithstanding the claim of a third person.

In Mr. Watson's Treatise upon the law as it regards sheriffs, page 196, he says, "As the sheriff is bound to execute the writ at his peril, when "the defendant becomes bankrupt, and his assignees claim the goods, "or there be any doubt whether the goods are liable to be taken on a *fi. fa.*, the sheriff should immediately apply to the court from which the "writ issues for protection, if one party will not give him a sufficient "indemnity; otherwise, by seizing the goods, or returning *nulla bona*, "the sheriff may subject himself to an action."

If the sheriff acts *bonâ fide* without favouring one party more than the other, and takes an indemnity for his security, I see nothing to make such indemnity void, or to require that he should take it from one party more than the other.—Sewell on Shff. 251; 3 Dougl. 240; Cro. Eliz. 178; 1 T. R. 418.

1 Saund. 161, n. 1.—A bond to save a sheriff harmless against a false return of a *fi. fa.* is good.—1 Lutw. 596, Knife v. Hobart.

That part of the rule which relates to entering a verdict for the defendant cannot be considered, as no leave was reserved to do so; but if it had, I apprehend it would have been unavailing. Mr. Crooks contended

at the trial, that the sheriff could not recover, because he had not pleaded properly to the action brought against him by Mr. Baldwin, the record of which action was given in evidence upon the trial.

By the bond of indemnity from the defendants to the plaintiff, they were bound to save harmless the plaintiff from any action, and it was for them to have pleaded to the action in the name of the sheriff; and they were bound to do so from the terms of the bond, without notice from the sheriff of the action brought against him.

McLEAN, J.—I do not see upon what ground the bond can be said to be void. It was surely competent for the owner of the goods and the other defendant to join in a bond to indemnify the sheriff against any action for a false return; and having given such indemnity, the parties cannot now escape from it on the ground that the action against the sheriff was not properly defended, when it was the duty of the defendants to have made that defence themselves.—1 Saun. 161, n. 1.

*Per Cur.*—Rule discharged.

#### GIBB V. MILLER.

An attorney, under the 10th rule of Easter Term, 5th Vic., must still be served with a demand of plea *in term time*.

In this case, the question for the court to decide was, whether the former rule of Hilary Term, 1 Wm. IV., was suspended by the 10th rule of Easter Term, 5 Vic., as regarded the time when a plea to a bill filed in vacation might be demanded from the attorney.

ROBINSON, C. J., delivered the judgment of the court.

This case, as well as another case of Widmer v. Small, pending before us, brings up the question whether, since the making of our rule No. 10 E. 5 Vic. an attorney, against whom a bill has been filed in vacation, may not have a demand of plea immediately served upon him, upon which he must, like other defendants, plead at the end of eight days; or whether there is not the same necessity, as before that rule was passed, for having regard to the time when a rule to plead might, according to the former practice, have been served upon him. My own judgment concurs with that of Mr. Justice Macaulay, expressed in a case before him in chambers. But as both my brother judges, before whom the two cases standing for judgment were argued, are of a contrary opinion—as their opinion has been sanctioned by decisions in the Practice Court, under which a course of practice has prevailed, and as it is necessary to have a decision on the point, it will be considered that the case of Haigh et al. v. Boulton is not overruled by us, but is confirmed by the court; and that the former rule of Hilary, 1 Wm. IV., is adjudged not to be suspended by the 10th rule of Easter, 5 Vic., but is still to govern as regards the time when a plea may be demanded.

#### ARMSTRONG V. ANDERSON AND CUMMING.

A. contracts *by deed* with B. to cut for him certain lumber. A. being in default under his special agreement, and supposing C. to have a joint interest in the lumber with B., sues B. & C. on an implied assumpsit. *Held*, that though A.



might sue B. alone on the implied assumpsit, yet that being concluded by the deed as to the parties liable on the contract, he could not sue B. & C. jointly.

Assumpsit on the common counts.

Anderson pleaded the general issue and set-off; and Cumming, the general issue alone.

At the trial the question was, whether the defendant Cumming was liable as a joint contractor with Anderson, or whether Anderson alone was liable.

The case was tried before the Chief Justice, at Cobourg, and a verdict for 55*l.* rendered for the plaintiff.

The plaintiff had, by a written agreement between him and Anderson alone, contracted to sell to Anderson all the merchantable timber of certain descriptions growing upon his land, and Anderson covenanted to pay for the timber at certain times.

It was stated in this agreement, that all the timber that should be made under it on the plaintiff's lot, should be marked "A. & C.," meaning "Anderson & Cumming." This was the only mention made of Cumming in the agreement. All the stipulations were between the plaintiff on the one side, and Anderson on the other. Cumming was a lumber-merchant, living at the Trent.

There was evidence given at the trial by the plaintiff's sons, that they had heard Cumming speak of this timber as if he were jointly interested in it with Anderson, and that he had made some payments on account of it; and there was also proof of his having paid some of the charges attending the getting out of the timber.

On the other hand, it was proved that it is a common course of business for lumber-merchants to contract with persons in the country to get out timber for them, to be delivered on the banks of rivers, to be there rafted for market. That the lumber-merchant frequently makes advances, and pays various charges on the lumber, before it comes into his hands; and that it is often marked in the joint names of such merchant and the person from whom he has contracted to purchase it, though the fact is that the timber is the sole property of the person in the country who has contracted to get it out, until it has been delivered, and is the sole property of the lumber-merchant afterwards, although for several purposes it is convenient to have the mark of both upon it, in order that the lot may be traced and distinguished from others, on its way down, and until it is finally disposed of in the market.

The evidence to prove a partnership between the defendants, either generally or confined to this transaction, was not conclusive; but the Chief Justice considered it not to be an open question, for that the sealed agreement in that respect must govern, and it proved the sale of the timber to have been made to Anderson alone.

In order to shew further what the transaction really was, the defendants produced in evidence a letter, dated the 4th of September, 1845, two months before the agreement was made, written by Anderson, and addressed to Cumming, proposing to him to get out a certain quantity of timber for the Quebec market, on condition of his making advances, and either to sell it at Quebec, through the agency of Cumming, paying



him commission, or to give him the preference as a purchaser, agreeing that the timber should be marked in their joint names, "by which means "Cumming might hold it as security for his advances."

In the same sheet of paper on which this letter, addressed to Cumming, was written, Cumming had written a copy of his answer, agreeing to the proposal, limiting the advances which he would make, and stipulating that he should be allowed to hold the timber in security for the advances, and that it should be marked with the initial letter of both names.

It was objected that this was no evidence, although the hand-writing of both the defendants was proved; because there was no evidence that such a letter was really written by the one, and received and answered by the other, at the time it bears date; and that it might, for all that was shewn, have been fabricated since, to serve as evidence on the trial.

The Chief Justice ruled that it must be given to the jury, who must judge of it in their discretion; that no doubt it was open to the suspicion which had been intimated, but that forgery or fraud was not to be inevitably presumed.

On the whole case, and chiefly on the sealed agreement itself, the jury were charged that the defendants were entitled to their verdict, on the ground that the defendant Cumming was not a joint contractor, and was not liable to the plaintiff.

Cameron, Sol. Gen., moved to set aside the verdict, and to enter a nonsuit on leave reserved, or for a new trial on the law and evidence.

He relied upon 4 M. & W. 550; 1 Campb. 303; 1 M. & S. 574; 2 Campb. 308; 15 E. R. 7; 2 C. & P. 325; 15 L. Jour. C. P. 129; 7 M. & G. 600.

The Hon. *R. B. Sullivan*, Q. C., shewed cause, and referred to the following authorities: 3 N. & M. 109; 5 B. & Ad. 902; 6 Bing. N. C. 296; 10 A. & E. 598; 1 M. & R. 301; 2 M. & W. 91; 1 Ver. R. 427; *Tobin et al. v. Merritt*, in our own court.

ROBINSON, C. J.—The jury were told, on the trial of this cause, that upon legal principles, no less than upon the justice of the case, the defendants were entitled to their verdict, on the ground that the plaintiff had not proved a joint liability. They found, however, a verdict for the plaintiff to the amount of his demand, and the defendants have moved to set it aside, as being against law and evidence.

I am of opinion, the verdict was against law and evidence. The timber was sold under the sealed agreement produced, and although, not having been delivered punctually under it as regards time, the plaintiff was disabled on that account from suing upon the agreement, yet he could not by his own laches change the nature of the transaction, and give himself a right of action against a party with whom he had not contracted.

It would be most unsafe to infer a partnership from the kind of evidence that was given upon this trial; for then in such cases the lumber-merchant, after having paid the full price for the timber to the person from whom he has contracted to buy it, would be compelled also to compensate the person from whom his vendor had purchased it.

The agreement under seal is in my opinion conclusive for the purpose

of shewing that the timber was bought from the plaintiff by Anderson alone; and in such a case, if Cumming had been shewn to be in fact a dormant partner (which he was not), that would not have made the debt a joint one, contrary to the sole contract actually made by deed; otherwise it would not be possible for one partner to make an individual contract respecting a matter in which the firm are to have an interest, which there is no doubt he may do.—*Beckham v. Knight*, 4 Bing. N. C. 243.

The case of *Tobin & Murison v. Merritt*, decided in this court (2 Cam. 1), was referred to on the argument as being in favour of what the plaintiff contends for here; but that case was wholly dissimilar. The plaintiffs were there suing the defendant as liable, with others his co-partners, for the amount of large advances made to the firm upon bills of exchange drawn in the partnership name, upon the plaintiffs, and accepted by the plaintiffs.

It was made a point in the case, that as the plaintiffs had taken from Merritt and Adams a mortgage to secure them to a certain amount, in respect to such advances, the plaintiffs were necessarily confined to the recourse upon the mortgage, and could not sue the firm which drew the bills in their partnership name for the moneys which the plaintiffs had paid on their account as acceptors of those bills; but the court determined that such a position could not be maintained, because the mortgage was a mere security upon land, in addition to the responsibility which the actual drawers of the bills incurred, in order to obtain the monies, and had not the effect of suspending the remedy against the parties to the bills.

With regard to the letter addressed by Anderson to Cumming, before the transaction took place, and the answer of the latter endorsed upon it, it is now admitted that it was properly received in evidence; but it is urged, as it was evidence subject to much suspicion, and the jury have apparently discredited it, their verdict should not be disturbed. There would be weight in that argument, if, without that letter, the transaction had appeared to be a sale to the two defendants; but the letter only confirmed what was the legal effect of the written agreement, and the plaintiff has not on his oath declared that he sold to any one but Anderson.

JONES, J.—I think the defendants entitled to have a nonsuit entered.

The agreement between the plaintiff and Anderson was under seal, and the defendant Anderson alone liable to the plaintiff under it.

The plaintiff, from his own default, conceived that he had no right of action on the deed; but having performed work for the defendant under the agreement, he abandoned any claim upon the agreement, and sought to recover from the defendant the value of his work, in *assumpsit*. If all was as he supposed, the action would be sustainable; but Anderson being in insolvent circumstances, and supposing that Cumming was a partner in the transaction, he joined the two in this action.

The credit by the deed was given to Anderson alone; and it appears to me, if work was done under it, for which *assumpsit* would lie, upon an implied undertaking in law to pay, only the person who could have been sued upon the deed, if the contract had been performed, could be

liable, upon a failure of performance, under the implied undertaking, as no credit was given to the other defendant, if, as was contended by the plaintiff's counsel, he was a dormant partner.

If it were otherwise, the plaintiff, by his own default, places himself in a better situation than he would be in by the strict performance of his contract: he gets the security of Cumming, when he chose to contract alone with Anderson.

But with regard to the liability of Cumming, I am of opinion that the evidence was very strong, and preponderated much in favour of the defendants, to shew that there was in fact no partnership.

There being nothing to throw any suspicion upon the genuineness of the letter, showing the nature of the arrangement between the defendants, the jury ought to have found that no partnership existed.

The admissibility of these letters as evidence at the trial, to prove the relation of the defendants to each other in the transaction, was objected to; the objection was withdrawn in the argument.

If there was any doubt upon the question, the case of *Anderson v. Weston et al.* (6 Bing. N. C. 296), cited in the argument, would remove it.

McLEAN, J.—On the trial of this cause, the plaintiff attempted to establish a partnership between the defendants, but failed to do so; and as the whole of his transactions were with the defendant Anderson, a nonsuit was moved for, on the ground that no joint demand had been established by the evidence for the plaintiff. It appears, I think, clearly from the evidence, that the defendant Anderson was engaged in getting out lumber, under an arrangement for the necessary advances to enable him to do so from the other defendant Cumming; and that, as is usual in such cases, for additional security, the timber was marked in a particular way; and I think it is also clear, that Cumming was only interested in Anderson's timber to the extent of the advances which he might be called upon to make, and a fair commission for sales.

It is not contended that Cumming had rendered himself in any way liable for the amount of plaintiff's demand, unless he was so in his capacity of partner of Anderson; and the proof of his liability as such being defective, I think the motion for a nonsuit was entitled to prevail at the trial, and must now be made absolute.

*Per Cur.*—Rule absolute for nonsuit.

---

#### THE CITY OF KINGSTON V. BROWN.

The court will not set aside the service of process for irregularity, upon the ground that it was served on the defendant while he was attending at the assizes as plaintiff in a civil suit pending and entered for trial.

This was a rule nisi to set aside service of process for irregularity, the only ground being, that it was served on the defendant while he was attending at the assizes as plaintiff in a civil suit, then pending and entered for trial there.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Thompson v. Calder*, in this court, 1 Cam. 403, was cited in support of the application. That was the decision of a judge



in the Practice Court, expressed to be founded on the case of *Cole v. Hawkins, Andrews*, 275, Str. 1094; but in that case the court was moved to grant an attachment for the act of serving the process, as being a contempt of the court, and they forbore to grant it on condition that the plaintiff would waive the service, thereby seeming to treat the service as not necessarily invalid.

We might, perhaps, in our discretion set this service aside as irregular, but we are not bound to do so; and unless it should appear there is a wilful intention to disregard the privilege which parties may claim, from arrest at least, while attending on courts of justice, and which it may be proper to extend also to non-bailable process, we should act, we think, most discreetly in not setting aside the service, since it places the party under no restraint, and in reality occasions him no inconvenience. It is not a matter of course always to set aside arrests even in such cases, though the court would generally attach the party making the arrest.

*Per Cur.*—Rule discharged.

---

MADDOCK v. STOCK.

In an action for the non-delivery of wood according to contract, the declaration did not state the *price* to be paid for the wood; neither did it aver that the wood was *to be paid for*, either on delivery or on a certain day; neither did it aver that plaintiff was *ready and willing to pay* for the wood.

*Held*: On special demurrer, declaration bad for the omission of any one of these averments.

The plaintiff declared on the following count:

"For that whereas the said defendant heretofore, to wit, on the 5th of August, 1846, in consideration that the plaintiff had, at the request of the defendant, advanced to the defendant the sum of eight dollars, being of the value of two pounds of lawful money, on and as part of the price of twenty cords of good hard-wood, of beech and maple, to be then forthwith delivered to the plaintiff, the defendant then undertook and agreed to deliver forthwith to the plaintiff, twenty cords of good hard-wood, of beech and maple, and to deliver to the plaintiff on the day following, to wit, on the 6th of August, 1846, a cord of dry white oak without charge, and although &c. the plaintiff was ready and willing, and from thence hitherto hath been, and still is ready and willing to accept and receive the said twenty cords of good hard-wood, of beech and maple, and the said cord of dry white oak respectively, according to the terms of the said agreement, yet the defendant, &c. did not deliver, &c."

To this count the defendant demurred specially on the following grounds:

1st. That it did not state that the said 2*l.* therein mentioned was *paid* to the said defendant, but says, that the same was *advanced*.

2ndly. That it only disclosed a portion of the consideration to be given by the plaintiff to the defendant, for the said wood therein mentioned, and did not shew with certainty what the residue of the consideration or the whole consideration was.

3rdly. That it did not with certainty say, with whom the defendant undertook and agreed to deliver the said wood.



4thly. That it shewed that the defendant agreed to deliver to the plaintiff, one cord of dry white oak-wood without any consideration or price therefor to be given or paid by the plaintiff to the defendant, thus disclosing as to such one cord of dry white oak-wood a *nudum pactum*.

5thly. That though it alleged the defendant undertook and agreed to deliver twenty cords of hard-wood, and one cord of dry white oak-wood to the plaintiff, it did not state that the plaintiff agreed to *buy, accept, or receive, or pay* for the said wood, so that there was no mutuality between the plaintiff and defendant.

6thly. That it did not aver that the plaintiff was ready and willing, and still is ready and willing to pay the defendant for said twenty cords of hard-wood, and said one cord of dry white oak-wood, on the delivery thereof forthwith or at any time.

*C. Durand*, for the demurrer, relied on 9 Jur. 177; Arch. N. P. 96, 85; 6 E. R. 568; 7 T. R. 125; 2 Salk. 113; 2 N. & P. 447.

*D. G. Miller*, contra, cited 2 N. R. 62; 2 N. & P. 265; 2 M. & W. 56; 4 B. & Ad. 433; 2 Lord Ray. 899; 9 Bing. 604; 1 N. R. 272; Plowden, 880; Chitty on Contracts, 12.

ROBINSON, C. J.—I am of opinion that the first count is bad, for several of the reasons assigned.

It does not state the price to be paid for the wood, which is indispensable. If no price was in fact fixed, then the sale should have been averred to have been for a reasonable price, and it should have been averred what that reasonable price was.

It ought also to have been shewn, whether the wood was to have been paid for on delivery or upon a certain day (*Andrews v Whitehead*, 13 E. R. 102; 6 Taunt. 108; *Elvidge v. Richardson*, 3 U. C. R. 149;) and clearly the plaintiff should have averred that he was ready and offered to pay for the wood, since it does not appear that payment was postponed by the contract as set out, and the defendant consequently was not bound to deliver the wood till it had been paid for, or the price tendered.

JONES, J.—I think the declaration bad for several of the reasons assigned, but particularly the second.

It appears upon the face of the declaration, that the eight dollars advanced to the defendant, and stated as the consideration for the promise on the part of the defendant, is not the whole consideration for the promise, because it is alleged to be a part of the price for the twenty cords of wood without stating any price (6 East, 568.)

McLEAN, J., concurred.

*Per Cur.*—Judgment for defendant on demurrer, with leave to amend.

#### SANDERSON V. COLEMAN.

The statement of a bailiff, that "he believed the cattle to be the plaintiff's," when he seized them on execution against the person in whose possession they were, does not divest him of the character of bailiff, so as to make it unnecessary to serve him with a notice of action.

JONES, J. *dissentiente*.

Appeal from the District Court of the Victoria District.

This was an action of trespass for taking cattle of plaintiff's.

Pleas, 1st, Not guilty.

2nd, Justification as bailiff of the Division Court, under *fi. fa.* against Aaron Sanderson, alleging the cattle to belong to him.

3rd, That there was no notice of action under the statute; and 4th, that the action was not brought within six calendar months from the time of the alleged trespass.

Plaintiff took issue on the 1st plea.

To the 2nd he replied, that the cattle were his own, and not Aaron Sanderson's.

To the 3rd and 4th pleas, *de injuriâ*.

On the trial the taking of the cattle by defendant from the possession of plaintiff's son was proved, and a good deal of evidence was given as to the ownership.

It was not proved that any notice was given, but to shew that the defendant was acting out of the scope of his duty as bailiff of the division court, and was guilty of a wilful trespass, it was attempted to be shewn that the defendant knew the property to be that of the plaintiff, and so acknowledged, but had nevertheless, being indemnified, proceeded to seize and sell, and under these circumstances that the trespass was of his own wrong, and therefore that no notice of action was necessary.

The expression proved to have been made use of by defendant was, that "he believed the cattle to belong to the plaintiff, but that he was indemnified, and had to sell them."

A nonsuit was moved for at the trial, on the ground that it was not shewn that the defendant acted in his own wrong, and not *bona fide* in the discharge of his duty as bailiff of the division court.

The cause, however, went to the jury, with a direction to find whether the defendant had acted in good faith, and with leave to defendant's attorney to move for a nonsuit the following term, if the verdict should be against him. The jury on coming into court declared, that they found the defendant had acted *bona fide* and in the discharge of his duty, but were about to give a verdict for plaintiff notwithstanding, and when informed that if defendant had acted *bona fide* he was entitled to a notice, and that their verdict must be in his favor on that issue, they retired again and subsequently rendered a verdict for plaintiff, and found that defendant had not acted in good faith as bailiff.

On the application the following term to set aside the verdict, and enter a nonsuit pursuant to leave reserved, the rule was made absolute, and the plaintiff then appealed to this court from the judgment.

A. Wilson, for the appeal, relied upon 7 C. & P. 629; 11 M. & W.; 10 A. & E. 583.

Cameron, Sol. Gen., *contra*, referred to 13 Price, 667; 4 Bing. 195.

ROBINSON, C. J.—I think the nonsuit was properly ordered.

We have no authority, in my opinion, to hold that the bailiff lost the advantage of notice of action, and the opportunity of tendering amends, by taking an indemnity. These are privileges expressly given to him by statute; and if there had been legal evidence of his being actually indemnified, I should not feel warranted in holding that he had lost the benefit of the statute. I am not aware that it has ever been so decided.

Then, as to the other point, I think the judge's opinion in term, corrected an error into which he fell at *nisi prius*, in supposing that the statement proved to have been made by the bailiff, that he knew or believed the goods to belong to Edward Sanderson, but that he was indemnified, and must do his duty, for that he thought he was bound to sell, furnished any fair ground for supposing that he acted otherwise than *bonâ fide*.

If the jury had taken that as a ground for holding him to have acted maliciously, I think their verdict should not have been allowed to stand, for I consider that it afforded no proof whatever of it.

Any constable or sheriff may well think that it is not his proper course of conduct, to make his own assumed knowledge or belief of facts the criterion of the rights of suitors, but to execute the command of the court when it is insisted upon, and leave the parties to settle the question of right between themselves.

I think the plaintiff has been properly nonsuited for want of notice of action.

JONES, J.—There was, in my opinion, evidence to go to the jury to shew that the defendant did not in truth act *bonâ fide*.

He stated that he knew the property to be the property of the plaintiff; but nevertheless, being indemnified, he considered it his duty to sell it.

If he *knew* the property to be the property of the plaintiff, and not of the execution debtor, it was not his duty to sell it, and in doing so, he acted under colour of the statute, not in good faith, relying upon his indemnification.

At all events, it was a question for the jury, as the judge stated in his charge to them; but in his judgment upon the motion for a nonsuit he says, that in his opinion, he should have nonsuited the plaintiff on the trial, there being *no* evidence to go to the jury. In this I think he was wrong; and if the verdict of the jury had been consistent, I should be disposed not to interfere with their finding; but as they at first found that the bailiff acted in good faith, and afterwards the contrary, I think the nonsuit should be set aside and a new trial granted, upon payment of costs by the defendant.

The notice required was for the protection of the bailiff; but here he was indemnified by the plaintiff in the original action, and needed not the protection of the statute. He nevertheless would probably be entitled to the notice, notwithstanding the indemnification, if he had not, as he said himself, known the property to be the property of the plaintiff, and not of the execution debtor, and, consequently, that he and the plaintiff were both trespassers in fact.

Being indemnified, he is only the nominal defendant in this action, the plaintiff in the original action being the real defendant, who would not be entitled to notice upon an action against him.

If the action had been against the bailiff and the plaintiff in the original action together, and they had joined in their defence, the bailiff would not be entitled to the protection of the statute, as decided in *Turner v. Stubbs et al.*, in this court, and if, by thus joining with another in his defence, he loses the protection of the statute, how much less is he entitled to it when indemnified by his co-trespasser.



McLEAN, J.—It appears, I think, clearly from the evidence, that the defendant in taking and disposing of the cattle acted as bailiff of the division court, and the mere statement made by him, that he believed the cattle to be the plaintiff's when he seized them on execution against the person in whose possession they were, cannot divest him of that character.

It was his duty when property was pointed out to him, or found in the possession of the party against whom he had an execution, to seize, and if he had any doubt as to the ownership or was apprehensive of a law suit respecting it, he might fairly call upon the plaintiff to indemnify him, and his doing so could not interfere with the right which the statute gave him, to have a certain notice given to him before action brought.

It should not be required that a bailiff shall take it upon himself to decide as to the ownership of property, merely upon the representation of individuals, and when such property is shewn to him, and he is indemnified in his proceedings, it is his duty to proceed to sell.

If he in doing so commits any wrong, both he and the plaintiff in the action are responsible to the owner of the goods, but in such case the bailiff is entitled to a notice of the action, in order that he may tender amends or take measures to defend himself, and if a plaintiff fails to give such notice, he has only himself to blame when he fails in his action.

The judge in the court below seems to have considered, when the motion for a nonsuit was made, that there was sufficient evidence to go to the jury, as to the issue whether the defendant had acted of his own wrong, but in that respect it appears to me he was in error, and that he should have either nonsuited the plaintiff or if he refused to accept a nonsuit should have directed the jury, that as the defendant was undoubtedly acting in the discharge of his duty, though erroneously, he was entitled to notice of action, and that the verdict must be in his favor, no such notice being given.

Leave having been reserved to move for a nonsuit, the judge did in term what it appears to me he should have done on the trial, and considering that his judgment is correct, this appeal must be dismissed with costs.

*Per Cur.*—Judgment below confirmed.

JONES, J., *dissentiente*.

---

#### BRADLEY V. CRANE.

This court will not interfere with the judgment of the court below in refusing a new trial upon the evidence, unless the whole of the evidence tends to repel any right of action whatever against the losing party.

Appeal from the District Court of the Dalhousie District.

This was an action for work and labour by a lumberman; and upon the evidence the only question was, whether the plaintiff had been hired to do the work by this defendant, or by one McCargar. The jury gave a verdict for the plaintiff, and an application was made to the judge below to grant a new trial, which he refused. His judgment was appealed against.



*A Wilson* for the appeal.

*J. H. Hagarty* contra.

ROBINSON, C. J.—I am of opinion, that upon the evidence, the defendant should have had a verdict; and there should, I think, have been a new trial granted, on payment of costs.

I should have been reluctant to set aside the verdict upon the evidence, if it had not appeared that it all tended to repel any right of action against the defendant, and to shew that the work sued for was done upon a hiring by another party.

It is important to restrict parties to their proper remedies in cases of this kind, which are so numerous in the particular branch of trade referred to; and a recovery contrary to evidence and right in one such case might encourage many groundless suits under like circumstances.

The positions of the lumber-merchants, and the persons with whom they contract to get out lumber for them, are very distinct; and if upon the evidence given here the plaintiff should finally recover, then I do not see why a person who employs a builder to erect a house for him should not, after paying him his price, be sued by all the persons whom he has employed to do the work or furnish the materials.

MCLEAN, J.—The amount claimed in this case, is not so large as to make the decision on that account of any particular importance to the defendant, but from the nature of the testimony it may be inferred, that there are probably other claims of a similar nature awaiting the result of this, and this may have induced the defendant to appeal from the judgment of the judge of the district court.

In an application for a new trial, where so much must necessarily depend upon the discretion of the judge who tried the cause, this court would seldom find it necessary to interfere, if the evidence appeared to be such as could sustain the verdict.

In this case, however, the evidence does not appear to be of that description; on the contrary, by the plaintiff's own shewing, the credit was given and the work performed for McCargar, with whom the plaintiff had worked during two previous years at lumber.

The account furnished to the plaintiff of the work done by him, and the order on McPherson & Crane for the amount, and the receipt given for twelve barrels of pork, on account of McCargar, signed by the plaintiff, shew, I think, conclusively, that whatever the understanding between McPherson & Crane and McCargar may have been respecting the timber, the plaintiff's credit was to the latter, and that he has no right to look to any one else for his demand. I think therefore a new trial should have been granted, and that the cause must be sent back to the district court with an order for a new trial on payment of costs.

JONES, J., concurred in ordering a new trial.

*Per Cur.*—Judgment below overruled, and a new trial ordered on payment of costs.

#### CORBETT V. CALVIN.

A. sues B. alone in *assumpsit*. B. pleads in abatement, that he made the promises jointly with C. & D.; that C. is resident within the jurisdiction of the court, and D. *without*.

*Held*, on demurrer to plea, in stating D. to be residing *out* of the jurisdiction of the court—that the plea was good.

On a joint contract by three, all must be sued, if within the jurisdiction of the court. If one is without the jurisdiction, the other two must be sued. One alone cannot be sued, if there are two remaining within the jurisdiction, because all three cannot be sued.

The plaintiff sued the defendant alone on the common counts.

The defendant pleaded in abatement, that the supposed promises were made jointly by him with one Hiram Cook and one Timothy H. Dunn; that Cook was living and resident within the jurisdiction of the court, and that Dunn, at the time the action was brought, was and still is resident in Lower Canada, out of the jurisdiction of the court.

The plaintiff demurred to this plea, because it stated Dunn to be residing out of the jurisdiction of the court.

*Alex. Campbell*, of Kingston, for the demurrer. He relied upon the following authorities: 6 Taunt. 587; 14 M. & W. 11; 10 Jur. 439, 441; 13 M. & W. 494; Law Times, 28th Nov., 1846.

*J. H. Hagarty*, *contra*, referred to the Provincial Statutes, 59 Geo. III. ch. 25, & 7 Wm. IV. ch. 3, sec. 6; 1 C. & K. 571; 1 Saund. 291 n.; *McKnight v. Scott*, Michaelmas Term, 3 Vic., in our own court.

ROBINSON, C. J.—*McKnight v. Scott*, Michaelmas Term, 3 Vic., in this court, is precisely in point to support this plea.

Of course the defendant is not to be understood by this plea as pleading the non-joinder of Dunn, but only of Cook, although he finds it necessary to state the contract to have been made by the three, as in fact it was; otherwise his affidavit, if made according to the truth, as of course it must be, would be inconsistent with his plea.

But then the objection is, that by this plea he is requiring the plaintiff to sue two out of three joint-contractors, which it is contended he cannot do, and therefore cannot be required to do.

We must consider the point with reference to our statutes 59 Geo. III. ch. 25, and 7 Wm. IV. ch. 3, sec. 6, the latter of which is not inconsistent with the former, but only requires that the residence of the absent contractor without the jurisdiction shall be sworn to.

Then the former statute, 59 Geo. III., in its 2nd and 3rd clauses, evidently contemplates the suing two or more joint contractors, where there are others that cannot be joined; and it is reasonable that it should be so. Those out of the jurisdiction of the court are to be considered, for the purposes of the action, as not existing, or as not having been parties to the contract.

In *Saunders*, 291 (e) (f), the cases are collected upon the point of *two* persons being sued upon a joint bond given by three, or upon a *joint* and *several* bond given by three; and it is deduced from the authorities, that if, upon a joint bond by three, two only be sued, it is only a matter pleadable in abatement: otherwise, where the bond is joint and several. This is upon an alleged joint debt.

JONES, J.—On a joint contract by three all must be sued, if within the province. If one is without the province, the other two must be sued. One alone cannot be sued, if there are two remaining within the province, because all three cannot be sued.

If it were otherwise, the one is made to answer severally, where he

contracted jointly with two others, and when one of the joint-contractors with himself can be sued.

The defendant in his plea was bound to state all the joint-contractors. Here it was not sufficient to state that one of his contractors was in the province, liable to be sued; but he must also state the other joint-contractor, although he may be out of the province.—6 Taunt. 587; Black. 947; 1 C. & R. 571; McKnight v. Scott, Mich. Term, 3 Vic. I think the defendant entitled to judgment.

McLEAN, J.—It was incumbent on the defendant, in pleading in abatement, to give the plaintiff a better writ; but it is contended here that the defendant has not done so, but has shewn that the contract was joint with two other persons, one of whom resided within the jurisdiction, and the other without the jurisdiction of this court, at the commencement of the action.

The defendant could not, as it appears to me, have done otherwise than he has done. He was obliged to shape his plea in a manner consistent with the facts, to be able to swear to its truth; and he has shewn that one of the joint-contractors was resident within the jurisdiction of the court, and ought to have been joined in the action.

The 1st sec. of the act 59 Geo. III. ch. 25, was intended to provide for cases like the present, and to prevent delays occurring from inability to serve all the parties to a joint contract with process.

It is enacted by that section, that an action against any joint obligor, contractor or partner, shall not abate for or on account of any joint obligor, contractor or partner not being made defendant, unless the party pleading such matter in abatement shall shew to the court that such joint obligor, contractor, or partner, is living within the jurisdiction of the court, so to be served with its process conformably to law.

In this case the defendant had shewn the contract to have been with two other persons, and one of them within the jurisdiction of the court, so that he might, in the words of the statute, “be served with its process conformably to law.” He gives to the plaintiff, in this respect, a better writ.

He does not profess to do so with respect to that contractor who resides out of the jurisdiction of the court, but as it was necessary to shew with whom the joint-contract was made, he goes on to shew that one of the joint-contractors was beyond the jurisdiction, and that the writ should therefore have been against those who are not so situated.

It never was contemplated, when the statute to facilitate proceedings against joint-obligors was passed, that where one partner in a firm was resident out of the jurisdiction of the court, a plaintiff might proceed against any one of several partners, there being others equally within reach of service of process; but this would be the case, if the construction contended for by plaintiff were to prevail.

*Per Cur.*—Judgment for defendant on demurrer.

---

DOE DEM. VANCOTT V. REID..

The court will order the weekly allowance to a plaintiff or defendant imprisoned on an attachment for non-payment of costs.

The question in this case was, whether a lessor of the plaintiff in



custody on an attachment for non-payment of costs, according to the consent rule in ejectment, is within the statute entitling a party in *execution* to a weekly allowance.

*D. B. Read* moved for the order, and relied upon the following cases : Cowp. 136 ; 5 Viner's Abr. "Contempt;" 1 T. R. 266 ; Graham v. Kingsmill, Cam. Dig., 1843 ; Wilson v. Dillingham, Cam. Dig., 1843.

*A. Wilson*, *contra*, relied upon 4 T. R. 316 ; 3 Evans's Stat., note to "Lords' Acts;" 10 E. R. 408 ; 1 B. & Ad. 652 ; 1 Dowl. 15 ; 3 Dowl. 649 ; 9 Jur. 427 ; 8 Taunt. 57.

ROBINSON, C. J.—In the King v. Kidd (Hilary Term, 1836), we determined that a deputy-sheriff, in custody on attachment for not paying over money upon an order of this court, might have the benefit of the gaol limits, upon the principle stated by the Court of King's Bench in England, in Rex v. Stokes, 1 Cooper, 136. And when one considers the provisions of the Lords' Act, 32 Geo. II. ch. 28, sec. 13, in relation to which the question arose in Rex v. Stokes, it should, in my opinion, govern the present, unless there is something in the language of our statute which requires a different effect to be given to it.

The reason upon which cases in England have been decided with reference to the statute 48 Geo. III. ch. 123, does not wholly apply here, because they turn upon the statute expressly being made only to include persons in execution "*on judgments*."

Our Insolvent Debtors' Act, 45 Geo. III. ch. 7, and subsequent acts, are not so worded, though they do seem to contemplate a judgment, in that part where they provide, that in cases where the debtor shall obtain his discharge by reason of the non-payment of the weekly allowance, the plaintiff shall not lose his remedy on his judgment, but may have execution against the goods, &c.

That, however, may well be referred to cases where there is a judgment, without necessarily restricting relief to those cases.

It suggests, indeed, an argument which was used in this case, namely, that if the debtor be discharged for non-payment of the weekly allowance, the other party will not, in cases like the present, have any other remedy ; but the same is true in regard to the cases under the Lords' Act, 32 Geo. II. ch. 28, as Mr. Evans has remarked in a note upon it, referring to the case of Rex v. Stokes ; and there is less reason why that should be held to deprive the prisoner of the benefit of our act giving a weekly allowance, because, in the first place, the allowance may be indispensable for the subsistence of the defendant, and in the next place, the other party can only, under our acts, lose the advantage of having the debtor in custody, by his own voluntary default in not paying the allowance.

It is true that our statutes, under which insolvent debtors obtain the weekly allowance, speak only of *plaintiffs* being ordered to pay the allowance, and do not in terms give the same relief to a plaintiff in any case in which he may be in execution at the suit of the defendant, as he formerly might have been on a judgment for the costs of the defence alone, and as he still may be in cases where the defendant proves a set-off exceeding the debt.

It was long ago determined in this court, however, that defendants would in such cases be compelled to pay the weekly allowance, on the



principle, that where a defendant is thus urging an execution against the plaintiff, he becomes in effect the actor or plaintiff in his turn; and it is consistent with the spirit of the act, which should receive a liberal construction.

I am of opinion, that an order may be made giving to a person imprisoned on an attachment for non-payment of costs, the weekly allowance.

JONES, J.—In the case of *Bonaforces v. Schoole* (4 T. R. 316) it was decided, that a prisoner in gaol upon an attachment for non-payment of money, was to be regarded as a prisoner in execution on a civil process, and was entitled to the benefit of the Lords' Act, 32 Geo. 2, ch. 28.

In the *King v. Hubbard*, 10 E. 408, it was determined, that a prisoner in custody upon an attachment for non-payment of a sum under 20*l.*, was not entitled to his discharge under the statute 48 Geo. III. ch. 123, because the statute was limited to persons in execution upon any judgment.

Our act, however, 45 Geo. III. ch. 7, is "for the support of insolvent debtors detained in execution."

So in the case of *The Queen against Dillingham*, in this court, Easter Term, 1843, it was decided that a prisoner upon an attachment for non-payment of costs, was not entitled to his discharge under 5 W. IV. ch. 3, for the same reason that the court, in the *King against Hubbard*, decided, that the defendant was not entitled to his discharge, viz., because the words of the statute extended the relief only to cases in which the prisoner was confined under the judgment of the court.

From a review of the cases cited below, and of all the cases to which I have access, and comparing the different statutes, and considering that the object intended to be attained by the legislature, was the relief of persons charged with a debt, and considering also that all such statutes should receive a liberal construction, I think the defendant entitled to the weekly allowance.—1 Cowper, 136; 1 T. R. 266; 4 T. R. 809; 8 Taunt. 57.

McLEAN, J., concurred.

*Per Cur.*—Order for weekly allowance granted.

#### BRIDGES V. CASE.

The plaintiff enters common bail for the defendant without having filed an affidavit of the service of process; declaration is served and plea demanded. The defendant moves for further time to plead, and to change the venue; the plaintiff afterwards signs interlocutory judgment, which the defendant moves to set aside for irregularity in the entry of common bail. *Held*: That the entry of common bail by the plaintiff without filing the affidavit of service of process, was an irregularity only, which the defendant by his subsequent conduct had waived.

This was a motion made to set aside an order made in chambers (on the 19th of December, 1846,) setting aside common bail, filed by the plaintiff for the defendant, as irregular, with costs, and to rescind the rule of this court making the said order a rule of court.

The plaintiff signed judgment on 15th of December, 1846, without filing return of process, and affidavit of service.

The declaration had been served and plea demanded the 4th of December.

The defendant had in the mean time acted on this service of declaration, by making affidavit on 14th of December, and taking out summons to change the venue and for further time to plead, and served these on the plaintiff's attorney the same day that judgment was signed, the several acts as it appeared having been done by each respectively, without knowledge of the other's proceedings.

*J. Hector*, in support of the rule, relied upon 1 N. R. 309, as being expressly in point.

*H. Eccles*, contra, referred to *Forrestel v. Graham*, Cam. Dig. page 61; *Lane v. McDonell*, Cam. Dig. page 64; *Nichol v. McElvey*, Cam. Dig. page 65.

ROBINSON, C. J.—On considering the affidavits, I am of opinion, that the rule should be made absolute.

The case of *Williams v. Strachan*, 1 New Repts. 309, is applicable, and none of the decisions in our court which were cited on the argument conflict with it.

Judgment was not in this case signed without an appearance for the defendant having been entered, though it was signed without appearance having been regularly entered, and when the defendant for whom the plaintiff had irregularly entered appearance accepted service of the declaration by moving for time to plead, and moving to change the venue, he can no longer object that he was not regularly before the court.

JONES, J.—This proceeding is in some cases considered void; in others, irregular.

In the case of *Goslin v. Tune*, 1 Cam. 277, in the Practice Court, I set aside a judgment entered on a cognovit, where no common bail had been filed, upon the ground that the proceeding was a nullity. Here common bail was filed, but irregularly, no affidavit of the service having been made and filed pursuant to 2 Geo. IV. ch. 1, sec. 4.

Such common bail being filed and declaration served upon the defendant, he applied for time to change the venue, as if he had entered an appearance himself, or common bail had been regularly filed by the plaintiff according to the statute, but abandoning this summons he afterwards applied to a judge in chambers to set aside the common bail and interlocutory judgment signed, considering the act of filing common bail a void proceeding.

The learned judge made an order upon the summons, treating the filing of common bail under the circumstances a nullity.

This application is to set aside the order of the learned judge, and I think it must be made absolute.

Entering a judgment where no common bail has been filed, as in the case of *Goslin v. Tune*, I regard not merely as an irregular proceeding, but void and not capable of being waived.

If common bail is entered without the necessary affidavit of service of process, I consider the proceeding irregular, and liable to be waived by the act of the defendant or by long delay, like any other irregularity, and that here the defendant after service of declaration, having acted as if he had appeared, waived the irregularity. The case of *Williams v. Strachan*, 1 N. R. 309, is an express authority on the point.

McLEAN, J.—An application was made to me in chambers, to set aside the interlocutory judgment signed in this cause for irregularity, which was resisted by the plaintiff on the ground that the irregularity had been waived by the defendant, having applied for time to plead.

The irregularity was in having entered common bail and signed judgment without returning the original process, and filing an affidavit of service as required by the statute.

As the statute says that if the defendant or defendants do not appear at the return of process or within eight days thereafter, it shall be lawful for the plaintiff, upon affidavit being made and filed of the personal service of such process, to enter common bail for the defendant, and to proceed thereon as if such defendant had put in and perfected bail to the action, and as it was shewn that no such affidavit had been made and filed, I considered the plaintiff's proceedings not merely irregular but void, without giving due weight to the fact of the defendant, after common bail had been entered for him by plaintiff, having applied for time to plead.

As the object of the process was to bring the defendant into court, and that object was accomplished when he applied for time to plead, and the service of process was thereby admitted, I am now satisfied, that I was wrong in considering the entry of common bail and signing interlocutory judgment as void, and concur in the opinion that the order made by me, setting aside the interlocutory judgment for irregularity, should be rescinded.

*Per Cur.*—Rule absolute, order rescinded.

---

MONAHAN V. FOLEY ET AL.

Where a plaintiff has the right to cut a *limited number* of trees upon land, and not the exclusive right to cut *all* the trees, he has not that possession of the land which will entitle him to bring an action of trespass *quare clausum fregit*.

Trespass *quare clausum fregit*, for entering the plaintiff's close, and taking away and converting timber and trees, laying the trespass in two counts in different lots of land.

A third count for taking away and converting timber belonging to plaintiff.

The defendants pleaded the general issue.

2ndly. That the plaintiff was not possessed of either of the closes as in the declaration alleged.

It was not proved at the trial, that the plaintiff had any estate or interest in the lands.

The first count charged a trespass upon lands in the township of Ramsay, the second upon lands in Pakenham. The land in Pakenham was vacant and ungranted, and still belonged to the crown, and the plaintiff produced a licence from the proper officer of the government, not to himself, but to one *John Monahan*, to cut upon that land "as many white pine trees as should be necessary for making 4000 feet of merchantable white pine timber, and to carry and transport the timber so cut through the lands of her Majesty, to the banks of any navigable water, in order to its being conveyed to market."



The license was expressed to be in force for nine months only, and was dated 14th July, 1845. It restricted the party from cutting any other or greater number of trees than therein mentioned, on pain of the license being void, and it was declared in it, that all timber cut contrary to those restrictions would be seized and disposed of to her Majesty's use.

To shew the plaintiff's right to the land in Ramsay, he produced a printed license to himself, from a person professing to be an agent of the Canada Company, to cut 18000 feet of white and red pine timber, on sundry Canada Company lots in Pakenham, during their pleasure, but not in any case to extend beyond the 31st of May, 1847, afterwards extended by endorsement to 13th June, 1847.

It was not shewn that the land in question belonged to the Canada Company, or that the person who gave the license was their agent. It was proved that in the summer of 1845, the plaintiff had opened some roads on those lands and made some sticks of timber on them, and that the defendant, or some of them, either disregarding these licences, or ignorant as they said of their being granted, entered on the same land and made some timber, white pine and other kinds, some of which they drew away, making use of the roads the plaintiff had cut.

The greater part of the timber cut by them in Pakenham was seized and disposed of by the crown agent as being cut without authority.

There was also some evidence of the defendants' having got a stick or two of the timber which the plaintiff cut.

At the end of the case it was objected by the defendants, that the plaintiff had shewn no right to the possession of either close, that the license from the government was not to him, but to another person, John Monahan, and his right to cut under it was not shewn; and that as to the land in Ramsay, it was not proved that the Canada Company were the owners of it, nor that the person who granted a license in their name had any authority from them.

The learned judge left the case to the jury upon the evidence, and they found for the defendants.

*Alexander Philpotts* moved for a new trial on the law and evidence, and for misdirection. He relied upon the following authorities, as shewing that the plaintiff had a sufficient right under the licenses to enable him to maintain trespass:—4 B. & C. 574; 1 E. R. 245; 3 Burr. 1560; 2 Str. 1238; 7 Cam. Dig. Trespass, B. 1; Moore, 355; 4 Taunt. 547; 5 T. R. 329.

*A. Wilson* shewed cause.—He contended that the verdict ought not to be disturbed. In all the cases referred to as sustaining an action of trespass, the plaintiff will be found to have had an *exclusive* right to *all* the trees, &c. on the land. Here the license given to the plaintiff expressly limits his right to an entry upon the land for the purpose of cutting a *certain number* of trees.—5 T. R. 329, and 3 Burr. 1824, clearly shew that a right when thus restricted, does not give the plaintiff such a possession of the land as will entitle him to bring an action of trespass.

ROBINSON, C. J.—I have no doubt that the verdict was proper, for besides the defects pointed out in regard to both licenses, they merely gave permission to the parties licensed to take a limited quantity of



timber of a certain kind. That gave them no exclusive possession of the land on which the timber grew; it gave them a right to enter for their own purposes under the license, but any other person who entered on the land for any other purpose was no trespasser in regard to them.

All such pine timber as they might cut according to the license would be theirs, but not all the pine timber on the lot; any one cutting pine timber on the same lands, might or might not according to circumstances be acting in derogation of their licenses, and in a manner injurious to them, but that would not make such persons trespassers as to them by reason of their entry on the land, whatever other remedy they might have, by complaint to the government or otherwise.

And with respect to any pine timber which strangers might wrongfully cut on the land, it clearly would not when cut become the property of the persons holding the license, but on the contrary would be at once the goods and chattels of the crown, and might be seized and sold for the benefit of the crown, as the license on the face of it states would be done, with respect to all timber wrongfully cut on the crown lands.

The case of *Burt v. Moore*, 5 T. R. 329, which was relied on by the plaintiff's counsel is not in point, because there the court expressly grounded their judgment on the fact, that the plaintiff was in exclusive possession of the land by virtue of the demise to him of the whole herbage and feeding of the close.

There is nothing corresponding to this, to place the plaintiff in possession of the land on which the defendants entered. There was some evidence as to the defendants' taking away a stick or two which the plaintiff had cut, but the evidence respecting that was left to the jury, and furnishes no sufficient ground for setting aside the verdict.

JONES J.—If the plaintiff had an exclusive right to all the trees, he would have a right to bring this action; but when he has only a right to cut a limited number of trees upon the land, he has not that possession of the land which entitles him to bring trespass *quare clausum fregit*. He has no exclusive possession or right. The same right might be given to others; and if one, under such circumstances, could bring an action against a stranger, all having the same right could do so.

The case of *Wilson v. Mackreth*, 3 Bur. 1824, shews clearly that this action cannot be maintained. In that case, it was an action against the defendant for entering the plaintiff's close, called Carr-Moss, and digging and carrying away turf and peat. The *locus in quo* was in the manor of Lord Suffolk and Sir James Smith, and the plaintiff, time out of mind, had an exclusive right of digging turf therein, in right of a freehold tenement in the manor. Unless he had that right exclusively, he could not have supported the action.

In the case cited by the plaintiff (3 Bur. 1560) there was the exclusive right of the plaintiff to dig ore. Here was no exclusive right in the plaintiff, and that is the distinction between the two cases.

McLEAN, J., concurred.

*Per Cur.*—Rule discharged.

## EVANS v. KINGSMILL, SHERIFF, &amp;c.

The plaintiff sues in trespass, *in one count*, for breaking and entering his house, and taking goods. The defendant justifies the *breaking and entering* in one plea, and in another plea he denies the *goods* to be the plaintiff's. The defendant has a verdict upon the 1st plea, and the plaintiff upon the 2nd for 30s. *Held*, that the plaintiff was entitled to judgment in the action and to the costs of the cause.

The plaintiff sued in trespass, in one count, for breaking and entering his house and *taking goods*.

The defendant justified in *one plea the breaking and entering* as sheriff, in order to levy under a *fi. fa.* against the goods of one Dray, which were in the plaintiff's house.

In another plea he defended for the taking of the goods, by saying that they were not the goods of the plaintiff.

The plaintiff replied to the plea justifying the entry into the house, that there were no goods of Dray in the house; and the issue on that plea was found by the jury in favour of the defendant.

Upon the issue on the plea denying the plaintiff's property in the goods, the jury found for the plaintiff, but only so far as respected one article, a stove worth 30s. The plaintiff entered judgment for the 30s., considering himself entitled to the costs of the cause.

The Hon. *R. B. Sullivan*, Q. C., moved to set aside the judgment entered for plaintiff. He contended that the 2nd plea, which justified the breaking and entering into the house, being found for the defendant, barred the recovery of the 30s., as it answered the gist of the action; and that the defendant therefore was entitled to judgment in the action, and to the costs of the cause. He cited *Doug. 782*; *10 Bing. 35*; *2 T. R. 166*; *10 M. & W. 484*; *Vale v. Noble et al.*, in our own court.

*W. H. Blake* shewed cause. He contended that the plaintiff was entitled to judgment for the 30s., and to the costs of the cause; because the defendant, pleading separately to the trespass for taking the goods, as a distinct and substantive cause of action, had the same effect as if the plaintiff had new assigned for taking the goods.

ROBINSON, C. J., delivered the judgment of the court.

By our new rules of court it is provided, as in the English rules, that (as regards costs) "several counts in trespass for acts committed at the same time and place, are not to be allowed." This being so, it must follow, that the plaintiff may be allowed to complain of the several injuries committed at the same time and place in one count, and with the same effect as if he had inserted several counts; otherwise, he would be driven to several actions. And independently of such consideration, it appears to me that the plaintiff is entitled to claim damages for all the acts of trespass charged in the count, and among them for the taking the goods; and that this latter trespass, which is a substantive, independent injury, and not charged as a mere aggravation of the breaking and entering, is not answered by the first special plea, but is answered by the 2nd plea, on which the plaintiff joins issue, and the defendant not having proved his defence under that plea, the plaintiff is entitled to the costs of the cause and to a judgment for his damages for taking the goods.

I refer to the cases of Phillips v. Howgate, 5 B. & Al. 202 ; and to Clegg v. Molyneux, Doug. 780.

The difference to be always borne in mind is between those cases in which there is a distinct *asportavit* of goods charged as a substantive injury, and where the spoliation of goods is merely charged as an aggravation of the act of breaking and entering the *close*.

*Per Cur.*—Rule discharged.

### MCDONALD V. MCDONALD.

The court will not grant a new trial at the instance of the plaintiff on account of the smallness of his damages, except in very clear cases, and under very particular circumstances.

(McLEAN, J., *dissentiente*. The learned judge, though agreeing with the rest of the court in the principle they have adopted, with respect to granting a new trial to the plaintiff for the smallness of his damages, was of opinion that the circumstances of this case, as disclosed in the evidence, were sufficient to warrant a new trial on payment of costs.)

Debt on bond, dated 10th September, 1836. Penalty 500*l*.

Condition (set out in oyer), "That defendant shall make or cause "to be made good and valid deeds to the plaintiff, in fee-simple, of "certain lands mentioned in the condition" (which had been bought by the defendant at sales for taxes), "that is to say, all such as shall "remain unredeemed at the end of the year limited by law ; and should "authorise the plaintiff to receive the assessment-money, with the 20 "per cent. additional on such as might be redeemed."

The defendant pleaded, 1st, *non est factum*.

2ndly, That the bond was obtained by fraud.

3rdly, He set out the fraud complained of, which was that the bond was made on condition that it was to be delivered to a third party, not to be given over to the plaintiff till certain differences between the plaintiff and the defendant should be settled, &c.

The plaintiff took issue on the pleas, and charged as breaches of the bond, that there were divers lots of land which remained unredeemed, and yet that the defendant refused to convey them ; and that divers sums were paid to the treasurer to redeem others of the lands, and that the defendant would not empower the plaintiff to receive the moneys.

At the trial, the jury gave a verdict for 150*l*. damages on the breaches.

Cameron, Sol Gen., moved for a new trial, on account of the smallness of damages given to the plaintiff. He contended that it was apparent upon the evidence that the damages were too small, and that manifest injustice would be done to the plaintiff, if the verdict were allowed to stand. He referred to the following authorities, as giving a discretion to the court in applications similar to the present:—Barnes, 445 ; 8 Mod. 196 ; 12 Mod. 348 ; 1 Str. 425 ; 2 Str. 1259 ; Graham's New Trials, 460 ; Chrysler et al. v. Smith, in our own court.

P. M. Vankoughnet shewed cause. He admitted that the court had a discretion in granting new trials upon the ground moved for, but contended that this was not one of those clear cases for the interference of the court, where the jury had indisputably given a verdict for a sum far below that which the plaintiff was entitled by the evidence



to receive. There certainly was some difficulty, under the evidence, in ascertaining what precise sum the jury should have given to the plaintiff; and as their verdict was for 150*l*.—not a grossly inadequate sum,—he thought it ought not to be disturbed.

ROBINSON, C. J.—Upon examining the evidence, I cannot see that it points to any amount with precision; and certainly the case is not one of that clear and precise kind, as to amount, as would justify us in setting aside the verdict at the plaintiff's instance for smallness of damages, which is not done except in clear cases, and under particular circumstances.

The affidavits do not, in my opinion, shew this to be a case in which we ought to deviate from a rule which is very generally acted upon.

JONES, J.—The transaction out of which the bond sued upon in this action was given, and the relation of the parties, induce me to concur in the opinion that this rule for a new trial should be discharged.

Had the jury, in a case between parties where a bond for a deed had been given under ordinary circumstances, rendered a verdict for the plaintiff for an amount far below the undisputed value of the land, I should not hesitate to set aside the verdict for the plaintiff, on his application, on the ground of smallness of damages; and the cases cited in argument would, I think, fully warrant that course.

This court has set aside a verdict for the plaintiff, on his application, when the jury allowed him damages much less than he proved on the trial. The case was *Crysler & Bostwick* against *Smith*, for non-performance of a contract to build a mill and dam.

MCLEAN, J.—On the trial the plaintiff's witnesses proved that the lands which defendant had bound himself to convey, and which were held by him under deeds from the sheriff, not having been redeemed, were worth upwards of 500*l*., and even the defendant's witnesses proved their value to be upwards of 300*l*.

The jury, however, gave only 150*l*., and the plaintiff swears that he has reason to believe, that such verdict was rendered on the supposition on the part of the jury, that one-half the land was all they were called upon to find for, and that the other half belonged to the defendant. The plaintiff further swears, and in this he is not contradicted by the defendants, that he had bought and paid for all the defendant's interest in the lands, and he swears to the value as being at least six hundred pounds.

It is, I think, clear from the evidence, that the plaintiff is entitled to recover from the defendant the fair value of the land which he has bound himself, and now refuses, to convey, and I think, it is also abundantly manifest from the evidence on the trial, and from the affidavits filed by plaintiff and defendant on this motion, that the sum awarded by the jury is very far short of the fair value of the land, in fact that it is not equal to one-half such value.

The defendant seems well aware of that fact, as he is strenuously opposing a new trial, at the same time that he is declaring on his oath that he considers the verdict unjust. He does not deny what is sworn to on the part of the plaintiff, that after the trial he expressed his satisfaction with the verdict, nor does he deny that he stated, that he would be a gainer by it, and that one lot of the land was worth more than the



verdict, but he alleges that he expressed his satisfaction at the result, on account of the disappointment which it caused to the plaintiff's expectations; now it should be recollected that the defendant, if disposed to act honestly, might easily have avoided this action. All he had to do was to convey the lands which he had received deeds for from the sheriff, in compliance with the condition of his bond, but instead of this when he found that plaintiff had obtained the bond, and was about to commence or had commenced an action against him, he seems to have resolved to retain the lands at all events, and contented himself with offering, through other persons, a sum far below the actual value of the lands, but yet upwards of 100*l.* more than the amount of the verdict.

If the verdict is really, as the defendant swears it is, unjust, he, as it appears to me, should not object to a new trial, but if it is unjust to the plaintiff in amount, there is an additional reason for granting such new trial.

It certainly does appear to me that the plaintiff will sustain injustice, and that the defendant will enjoy the fruits of what appears to be a very unfair, if not dishonest proceeding on his part, if the verdict is allowed to stand; and as new trials are usually granted to promote the ends of justice, I can see no reason why a new trial should not be granted at the instance of a plaintiff as well as of a defendant.

In actions for damages arising from wrongs generally, I am aware that smallness of damages is not usually considered a sufficient ground for a new trial, but that is only in cases where the same means do not exist of fixing the amount of damages, and where a fair discretion is exercised by juries under the evidence laid before them. Now in this case I am at a loss to imagine how a jury, under the evidence which established the value at least at 300*l.*, could have felt called upon or at liberty to give a verdict for only half that sum. If the verdict had been for 30*l.* or 50*l.*, there could surely be little hesitation in granting a new trial, and I can see no difference arising from the fact of a larger, but still very inadequate sum under the evidence, being rendered.

It was urged in argument, that this being an action between brothers, it is very desirable to put an end to litigation, but that I think is not a consideration which ought to influence the court on this occasion. When brothers come into court as litigants, they are entitled to the same measure of justice as other persons, and the defendant should not be allowed to practice a fraud upon his brother, and then escape almost with impunity, in order that an end may be put to litigation between persons so nearly connected.

In the case of *Crysler and Bostwick v. Smith*, in this court, the plaintiffs moved against their own verdict, and after due consideration of the circumstances, the court, finding that injustice would apparently be done if the verdict were to stand granted a new trial. The amount of which the plaintiff would be deprived in that case, was not any thing like so large a sum as this plaintiff must lose if he is compelled to retain his present verdict, and as in my judgment the verdict is not consistent with the justice of the case as established by the evidence, I think a new trial should be granted, on payment of costs.

*Per Cur.*—Rule discharged.

McLEAN, J., *dissentiente*.

## THIRKELL v. STRACHAN.

Where a party obtains a verdict upon an award, the court, upon a motion against the verdict, will not go into the merits of the award.

Where the submission with respect to some of the points to be settled, expressly states that the *majority* of the arbitrators shall have power to make an award, it will be intended by the court that this power, though not repeated throughout the submission, extends to all the matters in reference upon which the arbitrators cannot agree.

Where arbitrators, being authorised to do so, dissolve a partnership, and in order to adjust the terms of dissolution, award upon disputes that have arisen, with respect to the partnership, subsequent to the date of the submission : *Held*, That the award did not on that ground exceed the submission.

Arbitrators may direct promissory notes to be given for the sum awarded.

## Action on award.

Plea, that the award was made not only in respect to matters in difference before and at the time of the submission, but also in respect of divers property, viz. &c. which did not at the time of making the submission belong to any of the parties submitting, but to one Joseph Bruce ; and in respect of other claims and demands of the plaintiff which arose after the submission, by reason of the defendant's having between the time of the submission and award sold divers, &c. in which the plaintiff claimed to have an interest, and by reason of the plaintiff's having received divers sums of money for the defendant, and by reason of the defendant having between the submission and award received divers sums of money which were claimed by the plaintiff as being payable to him, all which matters were, *contrary to the express wish and desire* of the defendant, taken into consideration of the arbitrators in making their award, among the other matters of difference submitted to them, and that the award was made in respect of such subsequent matters as well as of the other differences.

The plaintiff replied (*de injuriâ*), that the defendant broke his promise without such cause.

The plaintiff, defendant, and one Masson, were partners together in a foundry at Kingston, and on 8th of August, 1844, they entered into a sealed agreement reciting, that certain controversies had arisen between them as partners, and covenanted thereby to abide by the award of two arbitrators named, and of a third person to be chosen by those arbitrators, or of the majority of them, of and concerning the said controversies, &c., "and also, that the said *arbitrators* may and shall have full power and authority, in any award which they may make in reference to the said matters, to declare and pronounce a dissolution of the co-partnership existing between the said parties, and on such terms as they shall see fit to award."

The time for making the award was limited to 15th of October, then next.

The declaration averred, that the three co-partners from time to time enlarged the award to 18th of February, 1845, and that on the 16th day of January, 1845, in consideration of the premises, and that the said controversies were unsettled, the three co-partners mutually agreed (not said that it was under seal), to abide by the award of the two arbitrators named in the sealed agreement, and of the third arbitrator whom they

had chosen according to that agreement, or any two of them, to be made by *them upon and in respect of the said matters in the said articles of agreement mentioned*, so as the award should be made by the 18th day of February then next.

The plaintiff then averred an award made by two of the arbitrators on that day, "of and concerning the said matters in difference so referred "as aforesaid, and thereby awarded that the defendant should on or "before the 24th day of February, 1845, pay to the plaintiff 1161*l.*, by "giving him four promissory notes of equal amounts, drawn by the "defendant, payable to the plaintiff or his order, with interest from the "date of the notes at 6, 12, 18 and 24 months, from the said 24th of "February. That after the expiration of the time for paying the last of "the notes, the whole foundry, stock, implements, tools, machinery, and "all other property therein or thereto belonging, together with the books, "debts and accounts, with the exception of certain claims mentioned in "a schedule, should become the sole property of the defendant; that until "the time arrived for paying the last of the notes, the said property "should remain in the defendant's possession, with power to sue for and "collect the debts," &c.

"That the defendant should deliver over to the plaintiff, certain debts "and demands," &c.

The plaintiff charged as a breach of the award, that the defendant did not on the 24th day of February, pay the 1161*l.* in notes according to the award, nor pay the money or any part thereof, or give over the accounts and vouchers, &c. At the trial the jury found a verdict for the plaintiff for 1161*l.*

*P. M. Vankoughnet* moved for a new trial, or to arrest the judgment, upon the ground that the arbitrators had exceeded their authority, in deciding upon differences which had arisen between the parties subsequent to the submission; 2nd, that the majority of the arbitrators had no right by the submission to determine the partnership; and 3rd, that the arbitrators had no power to award that one party should give the other promissory notes.

He relied upon 10 M. & W. 367; 7 Dowl. P. C. 192; McL. & Y. 393; 2 D. & L. 967, as authorities to support these several positions.

*Cameron*, Sol. Gen., shewed cause, and relied upon Str. 1082; 10 Mod. 204; 3 Campb. 468; Watson on Awards, 121.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that this rule should be discharged.

The sum for which the award was made is large, and it has been strongly represented, that injustice has been done to the defendant; but upon the latter ground we could not disturb the verdict.

The arbitrators were judges of the parties' choosing; they were in this case men of business and good character; and they took, it appears, a long time to investigate the differences referred to them, having both parties before them, and going into a full examination of their accounts.

If the arbitrators proceeded in any manner irregularly, there was a proper remedy; and when that has not been resorted to, or the objection has been taken and failed, we must suppose there was nothing wrong.

There can be nothing clearer than that we cannot go into the merits



of the award, upon a motion against the verdict ; and it is not expected we should do so.

Then, as to the legal exceptions. The arbitrators had power to dissolve the partnership expressly given by the reference, and to award it on such terms as they should think right ; and in this part of their duty, as well as in others, we think that the majority could act when the whole could not agree.

In that part of the submission, the power to a majority to make an award is not expressly repeated ; but the reasonable construction is, that the majority were to be capable of acting in all points of the case.

We cannot say that the award as set out exceeds the submission, thereby affording ground to arrest the judgment, or that the evidence given at the trial shewed that the arbitrators did in fact award upon matters not referred to them, which would of course be illegal.

It did not appear that they pretended to take up any matters of dispute that had arisen after the submission, by way of settling them as differences ; but that as they had resolved to put an end to the partnership, which they were expressly authorised to do, it became necessary, in order to adjust the terms of dissolution, to look into the existing state of the concern, in regard to property, liabilities, &c ; for otherwise they could make no just settlement between them of the late partnership affairs.

Then, with respect to the objection that the award pretends to give property to the defendant, which at the time was vested in a third party, and could not therefore become the property of the defendant, as the award contemplated,—it is clear that that is not a well-founded objection. Mr. Bruce, to be sure, had acquired a legal estate in the foundry, by purchasing it in at sheriff's sale, at the request of the co-partnership ; and to serve their purposes, he had made himself liable to the execution-creditor for the amount bid, but upon the understanding between him and the co-partners that they would pay up the notes which he gave, and thus redeem their interest ; and it was proved on the trial that they had done this.

The meaning to be reasonably ascribed to the award on that point is, that the same interest, whatever it was, which the firm held jointly before the dissolution, should, after the dissolution, be held by the defendant alone, whether it was freehold or leasehold, or as mere tenants at will to any third party.

There appears to be clearly nothing wrong in the arbitrators' directing notes to be given for the sum awarded.

*Per Cur.*—Rule discharged.

---

#### BECKETT v. CORNISH.

Whenever the endorser of a note writes to the holder, for the purpose of inducing him to believe it unnecessary to give him the regular notice of non-payment by the maker—especially when he states the maker to be insolvent—such letter, though written before the note has arrived at maturity, will be construed by the court as a dispensation of notice.

*Special case.*

In this case, the plaintiff had a verdict as the endorsee of a promissory note for 107*l.* 0*s.* 6*d.*, subject to the opinion of the court as to



whether the plaintiff was entitled to recover on the evidence of dispensation of notice contained in the following letter. It was admitted no notice was sent to the endorser :

“London, 23 August, 1843.

“Sir,

“When I endorsed the notes for 150*l.* in your favour, for Dr. McArthur, it was agreed that he should give me a confession of judgment for that amount; so that if anything went wrong, I might enter the judgment, and secure what I could to indemnify myself. Having learned that he had been distrained on for rent, and that he was not acting the economical part I had reason to believe he could have done when I became his endorser, I last week proceeded to Brantford, and there learned many things to his detriment, not fit to be placed on paper. I therefore entered up the judgment, and by this time, I have no doubt, the sheriff has made a levy. It is not my intention to apply any part of the money to my own use, but immediately to pay the same to you, in discharge of my obligation, as far as it will go. I have reason to believe I shall be able to meet the 50*l.* from my own private funds in November next; and I am willing to give you ample security on valuable freehold estate in this town, for the residue. What the stock will bring at sheriff's sale I cannot anticipate. I now write to you to know if you would be inclined to take any part of it at fair valuation. I am given to understand he has several trunks of new cloths, of the most expensive description, besides a horse, &c. ; further, that he has been selling some articles (blacking) for one-third less than it cost him. In fact, I was astonished, when he was applied to in my presence for the payment of a trifling sum, to hear him state that he had no money. I may be enabled to get some of the druggists here to take some of the furniture, rather than have it sacrificed; and I have directed my agent, Mr. Barton, of Brantford, to forward me a schedule of the drugs, &c., as soon as seized, a copy of which, if you wish, I will forward you. I put you in possession of the facts, that you may not be led to suppose it is my wish to act either dishonourably or dishonestly, or in any manner evade the responsibility I have so unfortunately incurred.

“W. K. Cornish.”

“Joseph Beckett, Esq.”

*Cameron*, Sol. Gen., for the plaintiff, referred to the following authorities:—2 H. Bl. 609; 5 M. & W. 5; Story on Notes, 282, sec. 364; 13 E. R. 214; 6 A. & E. 502.

*Harrison*, Q. C., for the defendant, relied upon 1 C. & M. 725; 2 Stark. C. 57; 1 Campb. 107; 1 Deacon, 728; 16 E. R. 105.

ROBINSON, C. J.—The indorser in this case made the debt his own, and cannot be supposed to have contemplated any remedy against the maker, upon the bill. There was therefore no object in presenting the note, or in giving him notice of its non-payment.

I have not met with any English case so strong for dispensing with notice, as the present; but I am convinced it is impossible, when any such case does arise there, that there can be any other decision than that notice was unnecessary.

In *Nicholson v. Gonthit* (2 H. Bl. 609), in a case somewhat like the

present in principle, though by no means so strong in its facts, Eyre, C. J., at *Nisi Prius*, held notice to be unnecessary; but afterwards, in term, he felt himself compelled to change his opinion, and reluctantly concurred with the other judges, in ruling that the notice was not dispensed with.

In *Claridge v. Dalton* (4 M. & S. 232), the drawer of a bill was sued, and it was objected, that notice of non-payment by Pickford, the acceptor, was not proved. The court held notice under the circumstances not necessary; and Bayley, J., a great authority on the law of bills of exchange, with which he was perfectly familiar, remarked, "that at the period when the bill was refused payment, Dalton was not in a condition to have taken any steps against Pickford, so as to derive any benefit from a notice."

The case before us is as strong a case of that description as can well be conceived; for here the defendant, before the notes which he had endorsed became due, seeing that the maker was going to ruin, as he says, had actually taken a confession of judgment from him for the whole amount, and had entered up judgment against him, and even taken all his goods in execution.

He had thus assumed the debt, and had wholly precluded himself from any recourse against Anderson on the notes, and had no right to expect him to pay them.

It is true, the defendant seems to have resolved, notwithstanding, to keep a strict look-out as to the regularity of notice; but his intentions in that respect cannot alter the effect of what had taken place.

In the American courts it has been repeatedly decided, that under circumstances like the present, presentment and notice are dispensed with.

Mr. Justice Story, in his work on promissory notes, treats it as a point well settled (see 271, 364), that under circumstances like the present, presentment and notice are unnecessary. I am clearly of opinion, that they were dispensed with here; and that the plaintiff, having placed on the record the proper averments in excuse of presentment and notice, which he could have been permitted to do by amending at the trial, was entitled to recover against the endorser.

JONES, J.—The letter of the defendant to the plaintiff, and the evidence of the defendant's son, shew that there was design on the part of the defendant to throw the plaintiff off his guard, and to induce him to forbear giving notice of the dishonour of the notes at maturity. Such being the case, the court should do nothing to favour his dishonourable scheme, but uphold the plaintiff in his verdict, if they can by law do so.

The letter being a dispensation of presentment of the notes to the maker, and notice of dishonour to the defendant, the question is, whether upon such a dispensation before the notes arrive at maturity, the plaintiff is entitled to recover.

The notes were endorsed by the defendant for the accommodation of the maker, who was insolvent at the time; and therefore the defendant could entertain no reasonable ground that they would be paid by the maker. And so satisfied of this was the defendant, that he took from the maker a confession of judgment for the amount of the notes, which

he could at any time enter up, and which he did in fact enter up and levy upon all the maker's property.

Under such circumstances it is clear, that a presentment of the notes to the maker at maturity was unnecessary, and such non-presentment should not discharge the defendant, the endorser.

There is very little to be found in the reports upon the subject of a dispensation of presentment of a note to the maker, and notice of dishonour to the endorser, before a note comes to maturity; but there are many cases in the United States, cited by Mr. Story in his Treatise on Promissory Notes, where presentment and notice are dispensed with, and upon clear and I think very satisfactory grounds.

In this case the defendant made the debt his own, by his conduct and by his letter to the defendant.

McLEAN, J., concurred.

*Per Cur.—Postea to plaintiff.*

#### THE QUEEN V. THE BOARD OF POLICE OF NIAGARA.

Mandamus granted, directing the Board of Police of Niagara to pay over to the Inspector of Licenses the sum of 240*l.*, received by the clerk of the board for tavern licenses, for 1846 and 1847: the Court deciding, that under the 17th sec. of 8 Vic. ch. 62, and the 3rd & 4th secs. of 8 Vic. ch. 72, the government, and not the Town of Niagara were entitled to receive the dues upon such licenses.

In this case, a mandamus was moved to the President and Board of Police of the Town of Niagara, directing them to pay over to the Inspector of Licenses for the District of Niagara the sum of 240*l.*, received by them for granting inn licenses for the years 1846 & 7.

The board, on the 12th December, 1845, made a by-law, providing that "every person whose application shall be granted, to keep an inn, "or house of public entertainment, in the town of Niagara, where wine, "brandy or other spirituous liquors may be sold, shall, before obtaining "his certificate, pay to the clerk of the board of police, to and for the "uses of the town, the sum of 5*l.*, and shall in addition pay to the "inspector of licenses for the said district 2*l.*, besides his fee for issuing "every such license."

Under this by-law, 240*l.* was paid to the clerk of the board, for tavern licenses, for 1846 & 7.

The inspector refused to issue any licenses, upon receiving 2*l.* only, as this by-law directed.

The inspector made oath that he demanded of the clerk and of the president of the board to pay the 240*l.* into his hands, but they refused.

Cameron, Sol. Gen., moved for the mandamus.

W. H. Blake shewed cause.

The argument of counsel appears in the judgment of the court.

ROBINSON, C. J. delivered the judgment of the court.

We are of opinion that the mandamus should be granted.

The statute 8 Vic. ch. 62, sec 17, gives authority to the board "to regulate taverns within the Town of Niagara, and to provide for the "proper licensing of them, at such rates as to them may seem expedient."



The effect of which provision is, to substitute the board within that municipality for the justices of the peace, as regards the granting of tavern licenses, fixing the rate, and regulating the taverns.

But that same clause expressly separates the duties to be paid for these tavern licenses from the duties paid on other licenses, placing the latter at the disposal of the Board of Police, for the public purposes of the town, but excepting the former.

Then it follows clearly, that these duties on tavern-licenses are to form part of the provincial revenue, as they would have done if the justices of the peace had continued to act in the matter of granting the licenses and fixing the duty.

The statute 8 Vic. ch. 72, is next to be considered, and the effect of that is plain.

By the 3rd and 4th clauses, the revenue arising from all duties or licenses to "houses of public entertainment" is pledged to secure the payment of certain debentures, to be issued by the government under the authority of that act, with the interest upon them; and this without any exceptions as to towns. When, therefore, the board by their by-law assumed to impose a charge of £5 on every license to keep an *inn* or "house of public entertainment" in which spirituous liquors might be sold, to be applied to the uses of the town, in addition to the sum of £2 to be paid to the inspector, they go contrary to law in two respects. They attempt to limit the sum payable to the inspector on account of the provincial revenue to a rate below what the existing laws direct shall at least be levied; and they take £5 out of the £7 which they charge upon the license to the use of the town; when it is clear that, under their own act of incorporation, whatever duty they should impose upon inns was not to go into the funds of the town, but was by the other statute (ch. 72), passed in the same session, directed to be appropriated to a specific Provincial purpose.

The by-law uses the terms "inn," "a *house* of public entertainment," as connected with the licensing system, and the vending spirituous liquors by retail; they mean the same thing; and the 8 Vic. ch. 72, expressly uses the term "houses of entertainment;" so that it can hardly be supposed that the board really imagined that they were granting licenses to any of the parties in the list produced to us, of such a kind as did not come under the 59 Geo. III. ch. 2, and 3 Vic. ch. 21, and the 8th Vic. ch. 72.

In justice to the board we must suppose, that they did not intend to levy a tax upon the public wholly apart from the statutes which relate to the subject.

They acted, no doubt, in imposing the tax, under the law which would give them authority for their proceeding, namely, their own act of incorporation, and must have meant the whole 7*l.* to be a duty imposed by them, in the same sense as the justices would have imposed a rate if the power had been left in their hands.

Then, when once the duty is imposed, the law directs its appropriation till the debentures have been paid off; and the duty which we must suppose them to have intended to impose under the law, must flow into the channel provided for it by the law.

It must be paid over to the inspector, to be by him transmitted to



the Receiver-General, unless it be clear that it should go to the Receiver-General direct, which I do not see is the case.

*Per Cur.*—Rule absolute for mandamus.

---

KELLY V. BALDWIN.

This court, upon an appeal, will order a new trial to be had in the District Court, where the evidence in its legal effect shews that the plaintiff should have been non-suited. *Semble*, that upon a legal objection against the verdict being found to be in favour of the appellant, this court must give effect to it, though they are satisfied justice has been done to all parties by the verdict.

(ROBINSON, C. J., *dubitante*.)

Appeal from the District Court of the District of Colborne.

This was an action upon the common counts, for goods sold and delivered, &c.

A verdict was given for the plaintiff.

The defendant contended that the plaintiff should have been non-suited, and moved accordingly in term.

The judge decided against the non-suit—his judgment was appealed from.

The facts of the case, and the ground of appeal, will more fully appear in the judgments of the court, particularly in the judgment of Mr. Justice McLean.

*Dalton*, for the appeal, contended, that the plaintiff should have been nonsuited at the trial, it being quite clear from the evidence that the plaintiff and two others contracted with the defendant and not the plaintiff alone.—1 Stark. N. P. C. 267.

*S. Richards*, contra, contended, that though there might have been a joint agreement, yet that the plaintiff and others had several interests and could therefore sue severally.—1 Saund. 153, 154, note a, last ed.; 6 Scott. Rep. 249; 10 B. & C. 410; 3 B. & C. 254. That the plaintiff and the other parties had several interests, he submitted, should be assumed from the judge below informing the court that he considered that fact proved.—8 Taunt. 245.

ROBINSON, C. J.—I think it most likely that the result arrived at is consistent with the truth of the case.

The judge says it was sufficiently proved that the plaintiffs contracted severally each to sell the timber on his lot. I do not see any evidence to that effect; but we may not see all that was before the judge, from the statements or admissions of counsel or parties.

If the defendant relied on the writing merely for sustaining his objection, it is rather obscure; but so far as it goes it shews a joint contract.

Yet I am not inclined to overrule the decision, for it will be oppressive if the use to be made of appeal, under the statute, is to compel from us a judgment that will enforce every technical objection after the judge has declined to give way to it, when we see that justice has been done; but my learned brothers are both clear that the legal objection was entitled to prevail, and strictly speaking it was.

If it had been proved that Kelly and the two others were respectively sole proprietors of each of the three lots named, then the question would

have been, whether that fact would have entitled each to sue separately merely on account of their several interests, although the writing imported a joint contract, and though the three might well enter into a joint contract, notwithstanding their several interests in the lands.

Knowing no more of the case than appears on the papers before us, we must admit that the defendant's objection to the plaintiff suing separately was well founded; and we therefore direct that the order of the judge discharging the rule *nisi* for nonsuit be reversed, and that the rule for nonsuit be made absolute without costs.

JONES, J.—The evidence shews a joint contract between the plaintiff and the defendant and two others, and no evidence whatever is given of any separate contract between the parties.

The defendant was entitled to a nonsuit, and the judgment of the court below must be reversed, and a nonsuit entered.

McLEAN, J.—Judging merely from the instrument which formed the foundation of the agreement between the defendant and the parties from whom he purchased timber, the contract appears to have been a joint one with three persons, and the evidence does not shew that the interest of these persons was several. For aught that appears, they may have been joint owners of the parcels of land from which the timber was to be taken; and it certainly appears that they were jointly contracting for the drawing of the staves and their delivery to the defendant.

The defendant agreed to make the staves on three lots of land by the 1st February, 1846, and the defendants agreed to draw them on or before the middle of March. For the timber and drawing, the three contracting parties were to receive from defendant at the rate of £6 10s. per 1000 for staves of six feet in length, paying in proportion for smaller ones. Now, according to the terms of this agreement, each was responsible for the drawing of all the staves made on the three lots, and one of them could not, under the agreement, claim from defendant payment for the staves drawn from any particular lot until the whole were drawn, according to that agreement.

If a failure had taken place in drawing out the staves from any one lot; then the agreement was broken, and no remedy could be had on it, and if the defendant received a portion of the staves, and the parties subsequently desired to make him pay for what he had received, they must have prosecuted jointly, as their original contract was a joint one.

It is very probable that the interests of the three persons who contracted with the defendant were several, and that the intention was that each should draw and receive pay for the staves which were made upon his own land; but if they chose to join in a contract with respect to the timber and the drawing of the staves on all their lands, they were not at liberty afterwards to act as if their agreement had been entered into by them severally.

It has not been objected to, but on looking at the amount of the verdict, after deducting the sum of £12 10s., the amount of a bill of exchange which by the judgment of the court below is to be deducted, the sum appears to exceed £25, to which the jurisdiction of the district court is limited in such cases.

The verdict is for £38; so that, deducting £12 10s., a sum of £25 10s. would apparently remain for the staves; but it is possible that

interest may have been allowed on the bill; in which case, the verdict for the staves might be strictly within the jurisdiction of the court.

It is not material, however, to consider the effect of the verdict, as upon the whole case laid before us, it appears that the action should have been brought in the names of the three parties who contracted with the defendant, one of whom may have received the amount due for the whole, and could certainly discharge the defendant from the payment.

It appears to me that the application for a nonsuit was entitled to succeed, and that the appeal must be sustained.

*Per Cur.*—Judgment below reversed.

---

### THE BANK OF UPPER CANADA V. GWYNNE ET AL.

The plaintiff declares against the drawer and acceptors of a bill of exchange under 100*l.* in one action; the acceptors sign as parties *jointly* liable. *Held*, that an averment, that the defendants “became jointly and *severally* liable,” is bad on demurrer. The form given in 3 Vic. ch. 8, must be adopted, with reference to the mode in which the several parties to the bill or note make themselves liable.

The plaintiffs declared upon a bill drawn by Gwynne upon Miller & Boomer, and accepted by them, with a second count upon an account stated.

The bill being under 100*l.*, the plaintiffs declared against all the parties on the bill in one action.

After averring the acceptance and endorsement to the plaintiffs, the count upon the bill concluded in the following words: “And whereby *the defendants* became *jointly and severally* liable to pay to the plaintiffs the amount of the said bill,” &c. &c.

The second count stated, “that the defendants were indebted;” and concluded, “and thereupon the defendants, in consideration of the premises, respectively promised to pay the said several sums of money respectively to the plaintiffs; yet they have not, *nor have either of* them, paid any of the said monies or any part thereof,” &c.

To the 1st count the defendant Miller demurred; “for that the said Richard Miller and George Boomer, in the first count mentioned, are stated to have accepted the said bill of exchange therein mentioned jointly; yet the liability alleged against the said Richard Miller is stated as a joint liability with the said John W. Gwynne, and several liability as against him the said Richard Miller.”

To the 2nd count the defendant Boomer demurred; “for that the indebtedness in the said count alleged is stated as a joint debt from the said John W. Gwynne, Richard Miller and George Boomer to the plaintiffs; and the promise to pay in said second count stated is *several*.”

*P. M. Vankoughnet* for the demurrer.

*J. Lukin Robinson* contra.

ROBINSON, C. J.—The first count of the declaration is bad, for the cause assigned.

The statute was never intended to have such an effect as to sever the acceptors of a bill who had accepted jointly, and thereby admit of a

recovery against one and not against the other, which might possibly be the case if all were allowed to plead severally, by reason of their being declared against as several contractors.

In the view of the statute, these two acceptors are to be treated as one party to the bill, and the drawer another; and the statute does allow their being so far declared against as jointly and severally liable,—that is, all three jointly,—or the drawer, and the two acceptors together, severally.

The form given in 3 Vic. ch. 8, it is true, does say that *all* the defendants may be declared against as liable jointly and severally; but that must reasonably be construed with reference to circumstances.

The legislature had only in view one person doing each act, as drawing, accepting, endorsing; and besides, the act, when it prescribes a form in the 2nd clause, expressly says, “varying the same according to “the circumstances of the case,” which has been overlooked here.

I see nothing wrong in the 2nd count; the promise is stated as a joint promise.

JONES J.—I think the first count bad.

There is no liability on the part of Miller, except jointly with Boomer, they being joint-acceptors. Gwynne is jointly and severally liable with Miller and Boomer together, and they together are liable with Gwynne severally; that is, they are one party, and Gwynne is another.

Boomer demurred to the 2nd count, upon an account stated, which is not objectionable.

If the bill was the only evidence upon the count, the plaintiff could not recover upon the trial; but there may have been an account stated between the plaintiffs and all three defendants, upon a distinct transaction, in which they are jointly found indebted; and if such were the case, and the first count could be sustained, the defendants being jointly and severally liable on separate and distinct grounds, as drawer, endorser or acceptor, a recovery might be had upon both counts.

Without a distinct debt, apart from the bill or note, the count upon an account stated should not be added to a count on a bill or note, under the statute; because there must invariably be a verdict for the defendants upon such count, the note or bill not being evidence upon such count.

McLEAN, J., concurred.

*Per Cur.*—Judgment for defendant Miller, on demurrer to 1st count.

Judgment for plaintiffs, on defendant Boomer's demurrer to 2nd count.

#### DOE DEM. M'DONALD V. LONG.

An award made upon a question respecting real property, *expressly referred*, is binding upon the parties so far as respects the right of either to bring an ejectment against the other, or to defend himself against an ejectment.

A., defendant's attorney, accepting his instructions from B., as the agent of the defendant, and making his defence under them, is bound, at the trial, by the admissions B. has agreed to make.

Ejectment for E. half of 4, in 4th Concession of Pickering.

It appeared, on the trial, that the defendant had gone into possession as an intended purchaser; that the parties had differences respecting the land, and referred them to arbitration, authorising the arbitrators to



award and determine "of and concerning all lands, contracts for lands, "titles, interest in lands, and real estate of any kind, &c."

The arbitrators awarded, that all title and claim of title on the part of Long to this land should be at an end, and that he should release to the plaintiff all claim to it.

It further appeared, that the defence to this action was conducted by Mr. A., an attorney of this court, under instructions received from Mr. B., who was an agent for the defendant; that Mr. B. agreed with the plaintiff's attorney to admit his title, in consequence of which he discharged his witnesses; but on the trial coming on, the defendant's attorney nevertheless desired to put the plaintiff to proof of his title, refusing to be bound by the consent of Mr. B.

The learned judge directed a verdict for the plaintiff.

*D. G. Miller* moved to set aside the verdict, and referred to *Billings on Awards*, 207.

*J. Duggan* shewed case, and cited *Adams on Ejectment*, 91; 3 E. R. 15; *Phill. Ev.* 410; 3 *Bing.* 119; 1 *M. & Rob.* 196; 7 *C. & P.* 6; 3 *Esp. C.* 134.

*ROBINSON, C. J.*, delivered the judgment of the court.

We see no sufficient reason for depriving the plaintiff of the benefit of his verdict.

There is no doubt that an award made upon a question respecting real property, expressly referred, as this certainly was, is binding upon the parties, so far as respects the right of either to bring ejectment against the other, or to defend himself against an ejectment.

Then, the award here did settle who should possess the land; and it was proved, that the defendant admitted that by the award he was to relinquish the land, and admitted also that he had derived his possession from the plaintiff.

We think also, that as the defendant's attorney accepted his instructions from Mr. B., as the agent of the defendant, and made his defence under them, he was bound by the admissions Mr. B. agreed to make; but at any rate it does not appear to us, that the plaintiff's action could have been resisted by this defendant, under the circumstances proved.

*Per Cur.*—Rule discharged.

---

#### THE QUEEN V. BROWN.

The following conviction before the magistrates, "for that the defendant did "at, &c., on or about the 1st day of December and upon other days and "times before and since, take and receive toll from the informant at toll- "gate No. 3, situate on the macadamized road between Hamilton and "Brantford, in said district, unlawfully and improperly, the said gate not "being in a situation or locality authorised by law," being removed into this court by a writ of *certiorari*, was held bad, in not shewing that the defendant was summoned or was heard; and in not setting out the evidence, or stating that any complaint was made or evidence given by any one on oath; in not stating how much toll was taken; and in not shewing in what respect the taking of the toll was unlawful.

When tolls fixed by the commissioners are exacted by a toll-gate keeper, at a gate not six miles apart from the one previously passed, the toll-gate keeper, under the 34th sec. of 3rd Vic. ch. 53, is not liable to a summary conviction.

The Solicitor-General having obtained a writ of *certiorari* to John Aikman and others, justices of the peace for the District of Gore, to

remove the conviction of Hugh Brown, for unlawfully receiving tolls at a certain toll-gate upon the macadamized road between Hamilton and Brantford, he moved to quash the conviction.

The information upon which the conviction was founded charged, that the defendant, a toll-gate keeper, did, at Ancaster, on or about the 1st December then last past, and upon other days and times since, take and receive tolls from the defendant, at toll-gate No. 3, situate upon the macadamized road between Brantford and Hamilton, in said district, unlawfully and improperly, as deponent believed.

The conviction was made on the 16th January, 1847, and by it the defendant was convicted, "for that he did, at Ancaster, on or about the "1st day of December (preceding), and upon other days and times "before and since, take and receive tolls from Mathias Kramer (the informant), at toll-gate No. 3, situate upon the macadamized road "between Hamilton and Brantford, in said district, unlawfully and "improperly, the said gate not being in a situation or locality authorized "by law."

The objections taken to the conviction were, that it did not state what amount of toll was taken.

2ndly, That it did not shew how, that is, in what respect, the gate "was not in a situation or locality authorised by law."

ROBINSON, C. J., delivered the judgment of the court.

The tolls to be taken on this road are regulated by the statute 9 Victoria, ch. 37, schedule B. 4, in which it is directed, that the tolls there set down, in the several columns, are to be charged "for distances "of *about six miles*," and that the tolls are to be paid at every gate.

It is the statute 3 Vic. ch. 53, which regulates the management of the macadamized roads generally; the 34th section of that act provides, "that if any collector shall take a greater or less toll from any person "than he shall be authorised to do by virtue of the orders and resolutions of the commissioners made in pursuance of the act, or upon legal "toll being paid or tendered, shall unnecessarily or wilfully prevent any "passenger from passing through any toll-gate, every such collector "shall forfeit and pay any sum not exceeding 5*l.* for every such offence,"

The 58th clause enacts, that where any penalty to be imposed under the act shall not exceed 5*l.*, it shall be recoverable by information before two or more magistrates; and that no writ of *certiorari* shall be allowed.

The conviction is removed at the instance of the crown. The defendant is convicted in 1*l.* penalty, and directed to pay 2*l.* 13*s.* costs.

The statute 2 Wm. IV. ch. 4, is the only statute which relates to the general form of convictions in this Province, and it does not by any means sanction such a record as is returned to us on this writ.

The conviction does not import that the defendant was summoned or was heard, nor does it set out the evidence, or state that any complaint was made or evidence given by any person on oath; and as to the offence charged, it states nothing precise and certain; it does not state how much toll was taken, nor shew why the toll taken was unlawful, any further than by the general allegation, that "the gate was "not in a situation or locality authorised by law," without explaining in what respect.

But independently of these objections, it is our opinion, that if the ground of complaint be (as I suppose it is) that the gate in question has been placed so near some other gate as not to leave "six miles, or about that distance, between," and if the general distribution of gates along the road has been such as to make the toll in that respect excessive, not leaving upon an average so much as six miles between the several gates (admitting for the moment that preserving that average throughout would be a sufficient compliance with the law), still that would be the illegal act of the commissioners, not of the toll collector, who clearly cannot be convicted under the 34th clause of 3 Vic. ch. 53, so long as he takes no greater or less toll than the commissioners have established.

Whatever other remedy may lie against the collector (if any) for taking an illegal toll, but only illegal because it has been illegally fixed by the commissioners, it is clear that he cannot be summarily convicted under that clause, because that is clearly levelled against the offence of taking more or less than the commissioners have appointed.

And as to the offence created by the latter part of that clause, namely, the preventing passengers from passing through after the legal toll has been tendered,—in order to make out a case for conviction under that part of the statute, it would be necessary to shew another toll legally established. But if the commissioners have really placed the gates so near each other as to infringe the direction in the statute, and if that makes the tolls illegal, then there would be no legal toll yet established, and consequently no legal toll can have been tendered; so that in that case, there could be no offence proved under that part of the clause.

Whatever may have been done since the passing of the last statute, establishing the distance between the gates, we are not clear that there could be now any conviction at all under the 34th sec. of 3 Vic. ch. 53, for taking excessive toll.

It would seem to require a new enactment, applying expressly to the altered circumstances of the tolls not being authorised by the orders and resolutions of the commissioners, but fixed by the statute; for though it would be just, and may seem reasonable, that the clause in question should be equally applicable since the change of system as before, yet criminal statutes, and more especially those that authorise summary convictions, are to be applied literally, and not extended by construction.

But we have at any rate decided, that on the other grounds I have mentioned, the conviction must be quashed.

*Per Cur.*—Conviction quashed.

---

#### TAYLOR V. CARR.

The defendant demurs to one of the counts in a declaration, and takes issue on the others. The plaintiff goes to trial, and assesses contingent damages on the demurrer for one farthing. The plaintiff succeeds on the demurrer, and the defendant has a verdict upon all the issues. *Held*, that the defendant is entitled to his costs of the issues in fact, and may have judgment and execution for them.

Slander.

The defendant moved for an order to tax the general costs of the defence in this cause.

In this case, the defendant singled out some of the words of a sentence in the count, and demurred to them as insufficient to sustain the action, the remaining words in the same count being sufficient.

The court gave judgment for the plaintiff on demurrer.

The plaintiff went to trial, and assessed contingent damages on the demurrer, and recovered a verdict for a farthing.

Verdict for the defendant on the issues. (See the pleadings, reported in 3 U. C. R.)

The question was, how is the defendant to get his costs?

*D. G. Miller* moved to direct the Master as to taxation of costs. The plaintiff did not recover on any issue in fact at the trial, and cannot therefore have damages or costs.—3 T. R. 654; 8 T. R. 466; 2 E. R. 261; 13 M. & W. 635. In assessing damages contingent on the demurrer, the plaintiff cannot be said to have succeeded at the trial on any one issue.

*J. Duggan* shewed cause. If the plaintiff recover anything, the defendant is only entitled to costs by way of deduction; the general costs in the cause go to the plaintiff.—2 Dowl. 333; 2 C. & M. 389; 4 Tyr. 239; 3 Dowl. 782; 2 C. M. & R. 445; 1 Gale, 159; 1 C. & J. 354; 2 M. & S. 797; 8 A. & E. 296.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the defendant is clearly entitled to the costs of the issues of fact on which he succeeded at the trial, and must have judgment for them.

The plaintiff on his part will recover no more costs than damages in this action, the verdict being merely nominal; and as the defendant's costs cannot therefore be deducted, he must have execution for them.

Similar cases have arisen where there have been judgments entered on the same record for plaintiff and defendant, in order to give the defendant process of execution for his costs.

*Per Cur.*—Let the defendant have judgment and execution for his costs.

#### HENDERSON V. BEEKMAN.

The plaintiff declares in trespass, in one count, for breaking, &c., on the 20th of November, 1845. The defendant justifies as assignee under a commission of bankruptcy issued against the plaintiff. The plaintiff now assigns other trespasses committed on the said 20th of November, 1845, to which the plaintiff pleaded "not guilty." At the trial, the plaintiff proved but one trespass committed. *Held*, that, under the pleadings, plaintiff should be nonsuited.

Trespass *quare clausum fregit*, and for taking away and converting divers goods of the plaintiff, laying the trespass on the 20th November, 1845, and on divers other days between that and the commencement of the suit.

The declaration contained only this one count.

The defendant pleaded, 1st, not guilty.

2ndly, Justification, for entering the house and taking away the goods, as assignee under a commission of bankruptcy issued against the plaintiff in April, 1845.



The plaintiff new-assigned other trespasses committed on the said 20th November, 1845, to which the defendant pleaded "not guilty."

It was shewn, upon the trial, that the plaintiff (a bankrupt) had obtained his certificate of discharge in August, 1845, which was confirmed by his Honour the Vice-Chancellor, on the 13th October, 1845, before the alleged trespass was committed; and it was proved, that the plaintiff had, in the meantime, purchased some other goods, which were in the shop when the defendant entered as assignee, and took possession.

The defendant's counsel objected, that inasmuch as one trespass only was charged, and admitted to be justified under the commission; and as no second trespass had been proved, the plaintiff should be nonsuited.

The learned judge directed a verdict for the plaintiff, with leave to the defendant to move to enter a nonsuit. (Verdict for plaintiff, 30*l.*)

*W. H. Blake* and *J. Lukin Robinson* moved accordingly. There could be no doubt that plaintiff, by his new assignment, averred another trespass on the same 20th of November, different from that named in the declaration. He should therefore have proved a second trespass. This he did not do; and the defendant was clearly entitled to a nonsuit.—16 E. R. 82; 5 Taunt. 197; 1 Bing. N. C. 454.

*J. Duggan* shewed cause. He contended, that the fact of the plaintiff having his certificate confirmed at the time of the entry and seizure of the goods by the defendant, made it clear that the trespass proved could not be the same trespass as the one justified; and if it was a trespass which the justification could not cover, there was then a second and distinct trespass proved, sufficient to support the new assignment. He relied upon 2 M. & W. 398, as directly in point; 1 M. & G. 710; 3 Scott, N. R. 332; 2 Moo. & Rob. 184.

ROBINSON, C. J., delivered the judgment of the court.

All that the plaintiff proved on the trial was, that the defendant had gone into his shop, and placed a person in possession for him, as assignee, to take charge of the goods in it, which he claimed under the bankruptcy commission and assignment.

The goods were not removed or injured. The wrong for which damages were claimed was for the entry into the shop, and consequential damages in obstructing the plaintiff's business.

Most certainly that trespass (and no other was proved) was committed by the defendant in assuming to act under the commission, and not on any other or different occasion; and therefore we think the plaintiff failed to shew, as he had undertaken to do by his new assignment, another and distinct trespass.

It is not enough for the plaintiff to say, that the justification first pleaded by the defendant could not extend to the case, by reason of the defendant having thought that to be within his power, as assignee, which was not within his power.

*Per Cur.*—Rule absolute.

## ARMOUR, ASSIGNEE OF BOYD, A BANKRUPT, v. PHILLIPS.

An assignment of property, made *bonâ fide* by a person about to become a bankrupt, to one of his creditors, thirty days before the commission of bankruptcy issued, is good, if it be made without the knowledge on the part of the creditor of any act of bankruptcy having been committed, or that bankruptcy was in contemplation.

Except in cases of fraud, this court will seldom interfere with the discretion of a judge at Nisi Prius, in holding a plaintiff, after defects in his evidence have been pointed out, to the case which he has proved.

Assumpsit for money had and received.

Plea, general issue.

It was proved, on the trial, that on the 12th August, 1844, J. C. Boswell gave to Boyd a bond for a deed of a town lot and house in Cobourg, on condition of Boyd paying 200*l.* by certain instalments, and also 150*l.* in discharge of a mortgage which Boswell had given on the same lot to Mr. Corrigan, with interest: that on the 19th November, 1845, Boyd, having made some payments in part of the 200*l.*, assigned and transferred to Boswell this bond, which he had received from him: that on the same day, Boswell entered into a sealed agreement with Boyd, by which he engaged, that on Boyd making certain payments, and paying up the interest on the mortgage, he would give him a bond for a deed, on condition of his paying up the mortgage: that, on 24th December, 1845, Boyd, in consideration of 128*l.*, assigned this last agreement to the defendant Phillips: that on the 14th January, 1846, the defendant, in consideration of 128*l.* 5*s.*, made over all his right, under the agreement and in the premises, to Mr. Boswell: that on 25th January, 1846, a commission of bankruptcy issued against Boyd, on his own declaration of insolvency, made on the 10th January, at the instance of some of his creditors: that while Boyd held the agreement, he insured the house mentioned in it, in order to make good the security given by mortgage to Corrigan before Boyd contracted for the lot, and which was therefore an existing encumbrance upon it when Boyd agreed to become the purchaser: that this house was burned down in the spring of 1846, after Boyd's bankruptcy; and the insurance office paid Phillips 150*l.*, the amount of the insurance, which he at once paid over in discharge of the mortgage.

It was to recover from Phillips this sum of money, that this action was brought, upon the assumption, that the assignment to Phillips must be held void, as being made in contemplation of bankruptcy, and in order to give Phillips a fraudulent preference.

The plaintiff closed his case, however, without shewing that Phillips was a creditor, or that Boyd was indebted to any one, except a trifling sum under 2*l.*, the unpaid balance of an execution.

The plaintiff then pressed to be allowed to give further evidence, to shew that Phillips was a creditor at the time of the assignment.

The learned judge consented that he might establish that, if he could do so by calling witnesses about whose admissibility there could be no question, but declined to receive evidence for that purpose from the bankrupt (who in June, 1846, had received his certificate) or from a creditor of the estate.

The plaintiff did not, indeed, call the bankrupt, conceiving that the learned judge would not receive him.

The plaintiff was nonsuited, with leave reserved to move to set the nonsuit aside; the learned judge holding, that even if Phillips were a creditor, yet an assignment of property *bonâ fide* made to him thirty days before the commission issued, without knowledge on the part of Phillips of any act of bankruptcy having been committed, or that bankruptcy was contemplated, could not be held to be fraudulent.

*D. B. Read* moved to set aside the nonsuit. He referred to the following authorities:—6 C. & P. 611; 1 P. & D. 102; 4 B. & C. 14; 3 C. & P. 99; 37th clause of our Bankrupt Act; 7 M. & W. 353; 7 E. 138; 4 E. R. 230; 5 Q. B. R. 115; 1 B. & Al. 145.

*Cameron*, Sol. Gen., shewed cause. He cited 1 B. & C. 444; 8 Bing. 369; Roscoe Ev. 563; 1 Esp. C. 72; 7 T. R. 67; 1 A. & E. 456; 6 Bing. N. C. 61; 10 B. & C. 44; 5 B. & Ad. 289; 2 Bing. N. C. 225; 5 M. & W. 389.

ROBINSON, C. J., delivered the judgment of the court.

We have no doubt that the nonsuit was proper,

It is impossible to view the case in any light, which would make it seem either just or legal, that the money for which this action is brought should pass into the hands of the assignee.

If the proving Phillips to have been a creditor of Boyd when the latter made the assignment to him, would have made the case clear for the plaintiff, then we should have to consider, whether there was anything done at the trial which unfairly prevented the plaintiff from proving that fact; and according to the learned judge's report of the case, we could not say that there was.

Whenever a court sees evidence of a really fraudulent contrivance or intention, there will always be a disposition to afford every reasonable facility for exposing it; but the operation of the bankrupt laws is under some circumstances rigid; and where no ground for suspecting fraudulent intention has been made to appear, I think we ought not to interfere with the manner in which a judge at Nisi Prius has exercised the discretion which properly belongs to him, in holding the plaintiff to the case which he had made out, without affording him the opportunity of going into a new case, in order to lay ground for a mere constructive fraud, after defects in his evidence have been pointed out.

It is not asserted that any evidence which the plaintiff either gave, or had it in his power to give, would have shewn that this defendant had any knowledge that Boyd contemplated bankruptcy, or had committed any act of bankruptcy, or could have varied the facts already proved, which shewed that he had made a *bonâ fide* purchase of the premises, more than thirty days before the commission of bankruptcy issued; and upon those facts it would be impossible to hold the assignment fraudulent, under the bankrupt laws.

Independently of all other considerations, the 150*l.* paid by the insurance company did not go into the defendant's hands for his own use, but went to discharge the mortgage to which the estate was subject, before either he or the bankrupt had these transactions respecting it, and to which it must equally have been subject, if it had been left to pass into the hands of the bankrupt's assignee, the whole effect of the

insurance being to make the mortgage a valid security to Mr. Corrigan, the original owner of the property. (See *Peters v. Jarvis*, Shff. 3 Cam.)

*Per Cur.*—Rule discharged.

---

GILMOUR ET AL. V. WILSON ET AL.

This court will very rarely indeed entertain an appeal against the decision of a judge in chambers, declining to give effect to a motion for irregularity.

The defendant moved before Mr. Justice McLean in chambers, on the 18th January, to set aside the writ and arrest of Wilson, one of the defendants, for irregularity, with costs.

On the 21st of January that summons was discharged.

The exceptions that were then taken were, that the affidavit of debt was imperfect, being on an account stated, and stating it thus: "for principal moneys found to be due to the said plaintiffs, upon the balance of an account stated and settled between the said *plaintiffs* and the said Archibald Wilson and William Graham."

It was contended, that there being no cause yet instituted, the word "plaintiffs" should not have been used; but that the names of the intended plaintiffs should have been all repeated at length, there being eight of them named in the commencement of the affidavit. And secondly, that the money ought to have been stated expressly to be due from the defendants.

The learned judge, without going into the alleged irregularities, discharged the summons, on a preliminary objection raised to the entitling of the summons, which omitted the Christian name of one of the plaintiffs.

The defendants then renewed their application before Mr. Justice McLean, who refused to entertain it. They then moved the court to set aside the writ and arrest of Archibald Wilson, on the same grounds as moved in chambers. They contended that they might be allowed to do so, because the wrong entitling of the summons was the misprision of the clerk, and not of the party or his attorney.

*J. H. Hagarty* moved to set aside the arrest, and relied upon 3 Chitty, 583; as giving him a right to amend his rule. He also referred to 1 Tidd, 183; 5 Dowl. 373; 8 Jur. 107; 11 E. 416.

*S. Richards* shewed cause. He referred to 7 T. R. 321; 7 A. & E. 522; 8 A. & E. 433; 8 Jur. 107; 2 Dowl. 383; 1 U. C. R. 403.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that we should not grant the application.

Supposing that the learned judge in chambers might have entertained the second application, he was not bound to do so, upon a mere irregularity. When a judge sets aside proceedings, and as either party apprehends illegally, it is a common course to apply to rescind his order in banc; but it would be a novel course to appeal from every decision of a judge declining to give effect to a motion for irregularity.

Such exceptions are carried already to a length sufficiently vexatious, without making orders, refusing to set aside proceedings on the ground of irregularity, the subject of appeal.



I do not mean to say that that is never done, or may not in some cases be allowed ; but that it is most unusual.

I do not think we should in this case set aside the proceedings by entertaining a second application, when the judge at chambers refused to do it ; because, as to the particular reason given for the second application, it cannot justly be called the misprision of the clerk altogether, when it is shewn, as it is here, on affidavit, that the summons in which the wrong entitling occurred, was in fact wholly drawn up by the defendant's attorney who obtained it.

I cannot admit, that because the judge, or the clerk who signed it, relied on his accuracy, and did not compare the summons written by himself with the affidavit on which he moved it, he is therefore exempt from any imputation of laches, and privileged to renew exceptions which have so little substance in them.

*Per Cur.*—Rule discharged.

#### DOE ON THE SEVERAL DEMISES OF BOWMAN ET AL. V. CAMERON ET AL.

Under the provincial statute 9 Geo. IV. ch. 2, sec. 3, a deed conveying land to trustees, for the use of a religious society, is invalid for want of registration.

This was an action of ejectment, brought to recover possession of a small piece of land, which Bowman, one of the lessors of the plaintiff, had formerly conveyed to certain trustees, to be held by them and their successors for the use and benefit of a congregation in connection with the Established Church of Scotland, as the site of a church.

A majority of the trustees and of the congregation had separated from the Church of Scotland, but nevertheless claimed a right to the continued possession of the church and ground ; and this action was brought on the several demises of Bowman, who had made the deed of trust, and of those trustees who had retained their connexion with the Church of Scotland.

At the trial, no evidence was given, but it was agreed to refer the case to the judgment of the court, upon a case stated, which case admitted the separation of the congregation and of the portion of the trustees now in possession, from the Church of Scotland, and their formal disclaimer of connexion with that church by written resolutions, on account of the course taken by the Church in Scotland in the matter of church patronage.

The gentleman who had given the land, Mr. Bowman, seeing the church and ground now in possession of those who had separated from the Church of Scotland, contrary to the declared intention of his deed of gift, wrote to one of the trustees who still adhered to the Church of Scotland, reminding him "that he had given the land for the use of a "church in connexion with the Church of Scotland established by law, "and for no other purpose ;" and in consequence of this remonstrance, the trustee to whom it was addressed demanded possession, before this action was brought, of the church and land on behalf of the lessor of the plaintiff Bowman.

ROBINSON, C. J., delivered the judgment of the court.

This case might have called for the discussion and consideration of such questions as had arisen in *Doe dem. Methodist Trustees v. Bell*, decided in this court, in Hilary Term, 7 Wm. IV., and *Doe dem. Dickson et al. v. Bain*, which was before us in Trinity Term last (3 U. C. R. 200); but both parties desired the judgment of the court upon a preliminary question, on which they conceived the case must turn, namely, whether the deed given by Mr. Bowman, conveying the land to trustees for the use of a religious society, was or was not invalid for want of registration.

We have considered that point, and are of opinion, that this deed, which was evidently intended to be made under the authority of our statute 9 Geo. IV. ch. 2, is ineffectual for passing the estate, by reason of its never having been registered.

We have had occasion, in the case of *Doe dem. Anderson v. Todd et al.* (2 U. C. R. 72), and in other cases, to state the grounds of our opinion, that the English statute 9 Geo. II. ch. 36, respecting the conveyance of land to charitable uses, must be taken to be in force in Upper Canada.

The statute 9 Geo. IV. ch. 2, and other similar statutes passed in Upper Canada, must be looked upon as having been enacted by the Legislature for the purpose of relieving religious societies, to a certain extent and under certain restrictions, from the disability to take lands for their use which the English statutes imposed.

Then, it is expressly required by our statute 9 Geo. IV. ch. 2, sec. 3, that the trustees receiving any such conveyance as that statute permits to be made to them, "shall, within twelve months after the execution of "such deed, cause the same to be registered in the office of the registrar "of the county in which the land lies."

Now we think that the Legislature, having conferred the power to make such conveyances, with a direction that they shall be registered within a certain time, have in effect made the registration necessary for perfecting the assurance.

The authority given by them must, like other powers in similar cases, be executed in the manner required.

It is true that the clause stands as an independent enactment, and is not in terms made a condition precedent to the estate vesting; so that there is ground for contending, that it may be looked upon as a mere direction, which may be disregarded without the title being affected by the omission.

Independently, however, of the principle of law which requires an authority to be executed strictly, the Legislature have given evidence in the statute that they intended to make the registration mandatory; for in the last clause, in which they extend the benefit of the act to trust-deeds that had been made before its passing, they add this condition; "provided such conveyance shall have been already registered, or shall "be hereafter registered, as aforesaid, within twelve months after the "passing of this act," thereby refusing to give validity to the deed, unless "it has been or shall be so registered."

It is not to be supposed that the Legislature intended to make a compliance with the requisitions of the statute a matter of less stringent necessity in regard to conveyances to be made after its promulgation, than in regard to those which had been made before the act was passed.

The statute 3 Vic. ch. 73, and 3 Vic. ch. 74, secs. 16 & 17, are material to be considered in connection with this subject; and we have not omitted to consider, whether our statutes, 37 Geo. III. ch. 8, and 4 Wm. IV. ch. 1, sec. 47, can have any effect upon the question of registration of the deed being necessary to the validity of the conveyance. There being no livery of seisin shewn in this case, which might support the idea of a feoffment, nor anything that could enable the deed given by Mr. Bowman to take effect as a release, we may assume that it must operate as a bargain and sale, or not at all; and in order to that, we must, before the provision made by 4 Wm. IV. ch. 1, sec. 47, have required registration, to supply the place of enrolment under our act, 37 Geo. III. ch. 8, if it had been a common deed *inter partes*.

Then, that latter enactment, which provides "that a deed of bargain and sale of land in Upper Canada shall not be held to require enrolment, or to require registration to supply the place of enrolment, for the mere purpose of rendering such bargain and sale a valid and effectual conveyance for passing the land thereby intended to be bargained and sold," has reference only to the necessity for registration of deeds of bargain and sale generally, in order to give them effect under the statute of enrolment, 27 Hen. VIII. ch. 16, and does not, in my opinion, in any manner control the footing upon which deeds given for lands conveyed in trust for religious societies are placed by the statute 9 Geo. IV. ch. 2, and which are required by that statute to be registered, upon distinct considerations, not confined to conveyances by bargain and sale, but extending to all such conveyances.

It is on these grounds our opinion, that the deed given by Mr. Bowman has not divested him of the estate, not being yet registered as the statute requires; and that there must be a verdict entered for the plaintiff on the demise of Bowman.

*Per Cur.*—*Postea* to the lessor of the plaintiff on the demise of Bowman.

#### ADAMS V. BAINS, OVER-HOLDING TENANT.

A tenant remaining in possession after the expiration of his term, and paying two months' rent, cannot, in the middle of the third month, be treated by his landlord as an overholding tenant, under the 4 Wm. IV. ch. 1.

*Quare*:—Does the statute 4 Wm. IV. ch. 1, apply in any case but the plain one of a tenant overholding after the expiration of a term, expressly created by contract between the parties.

This was an application for a writ to place the landlord in possession, under 4 Wm. IV. ch. 1, on inquisition returned.

The writ to take an inquisition in this case had issued as a matter of course, upon an affidavit stating a plain case within the statute 4 Wm. IV. ch. 1, sec. 53, of a lease for a certain term, which had expired on 25th October, 1846, a demand of possession served on the 18th January, and the tenant's refusal.

The jury found, as in common cases, that the tenant had held over after the expiration of his term; and the landlord applied to a judge

chambers for a precept to the sheriff to put him in possession. But upon a view of the proceedings returned with the inquisition, the case appeared to be, that after the term had expired, on the 25th October, the tenant remained in possession, and had paid the landlord two months' rent, up to the 25th December; and on the 18th January, the landlord served a written notice, with a view to the summary proceeding under the statute, requiring the tenant to quit possession immediately.

The answer of the tenant was, that his term had not expired.

ROBINSON, C. J., delivered the judgment of the court.

Strictly speaking, a monthly tenancy had been created by the acceptance of rent for the two months, and the landlord could not terminate it abruptly, by demanding of the tenant, in the middle of the month, to quit immediately.

If the landlord had given him notice before, or on the 25th December, to quit on the 25th January, and he had not done so, then, upon a notice given afterwards under the statute, the landlord might have applied for this proceeding, and the court would have considered whether the case was one within the act; for I am not aware that it has yet been determined that the statute clearly applies, except in the plain case of a certain term expressly created by the contract of the parties.

But here a proper foundation for the proceeding was wanting. The landlord certainly concealed from the court the fact of his accepting rent after the 25th of October, and applied for a writ, as if nothing had taken place between him and the tenant after that day.

He should have stated the whole truth, and left the court to judge of the case on a view of all the facts.

We think the judge in chambers did right, in declining to award a precept upon the inquisition; and that the proceeding should be carried no farther.

*Per Cur.*—Writ of possession to landlord refused.

#### WATSON v. CITY OF TORONTO GAS-LIGHT AND WATER COMPANY.

A person throwing noxious matter into Lake Ontario, or any other public navigable water, is liable *both* to an indictment for committing a public nuisance, and to a private action at the suit of any individual *distinctly and peculiarly* injured.

The right which an individual has to the use of public navigable water in its pure and natural state, is not founded upon the possession of land or of a mill or house adjoining the water, but simply upon the same common law right which every other individual has, to use the water in its unadulterated state, whether he possess land, mills or houses on its banks or not.

*Semble*, that in an action on the case, a declaration would be open to special demurrer, in claiming damages for an injury stated to have been committed, or at least continued, after the action had been commenced.

The plaintiff declared in case—

“For that whereas before and at the time of the committing by the said company of the grievances hereinafter next mentioned, the said plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain lot or parcel of land, situate and being in the City of Toronto, in the said district, and known and described, and laid down and designated on a certain plan adopted by the Common Council



of the said city, as water lot No. 9, and being partly covered by the water of the Bay of Toronto; and whereas during all the time aforesaid, the said plaintiff was and still is *possessed of a certain messuage or distillery*, situate, erected and being in and upon the said lot or parcel of land, in which the said plaintiff, before and at the time of the committing of the said grievances, and from thence until the said plaintiff was forced and obliged to abandon and discontinue the same, as hereinafter mentioned, *carried on the business of distilling and manufacturing whiskey*, and, *by reason of such possession of the said messuage or distillery, and of the said lot or parcel of land, the said plaintiff was entitled to use, and did use*, and still is entitled to the use and benefit of the water of the said bay, in a pure, wholesome and unadulterated state, *for the working of his said distillery, and for the distilling and manufacturing of whiskey therein as aforesaid, and for all other purposes* for which he the said plaintiff might or may require to use the same, whereby the said plaintiff, before the committing of the said grievances, made and realised divers large gains and profits. Yet the said company, well knowing the premises, but wrongfully and injuriously contriving and intending to injure, oppress and ruin the plaintiff, and to corrupt, pollute, and deteriorate the waters of the said bay, so used by the said plaintiff in his said distillery as aforesaid, and to render the said waters unfit and improper for the use of the said distillery, or for the making or manufacturing of whiskey, and to hinder and prevent the plaintiff from obtaining and extracting the ordinary and usual quantity of whiskey or spirit from the grain that might be thereafter used and consumed in the said distillery for that purpose, and to render the whiskey that might be and was thereafter made in the said distillery useless, unpalatable, unsalable and of no value, and to put the plaintiff to great expense and trouble, and to render the said business of distilling or manufacturing of whiskey as aforesaid, so by him carried on in the said distillery as aforesaid, not only an unprofitable, but a losing business, and to force and compel the plaintiff to abandon and discontinue the same, and to deprive him of the gains and profits which he might and could and otherwise would have made thereby, and to render the said distillery, with the implements and utensils of trade thereunto belonging, wholly useless and of no value to the said plaintiff,—afterwards and whilst the said plaintiff was so possessed of the said lot or parcel of land, and of the said messuage or distillery erected thereon as aforesaid, and so entitled to the use and in the actual use and enjoyment of the said water of the said bay as aforesaid, and whilst the said plaintiff was so carrying on his said business of distilling or manufacturing of whiskey in the said distillery, to wit, on the 1st day of January, in the year of our Lord 1844, and on divers other days and times between that day and the day of the commencement of his suit, secretly, wrongfully, injuriously and improperly, and without the knowledge or consent of the plaintiff, threw, discharged and cast into the said Bay of Toronto and into the waters thereof, in a part near to and adjoining the said lot and premises of the plaintiff, divers large and excessive quantities, to wit, 100 hogsheads, of gas-tar, coal-tar, and other noxious, unwholesome, deleterious and offensive matters and substances, whereby the said waters of the said bay, which the said plaintiff had been and was accustomed

to use as aforesaid, for the purposes of his said distillery and for the working thereof, and for the making and manufacturing of whiskey therein, and still is entitled to use for the purposes aforesaid in a pure, wholesome and unadulterated state, became, and during all the time aforesaid were, and still are, greatly impregnated, polluted, corrupted, adulterated and deteriorated, and rendered impure, unwholesome, and unfit and improper for the uses and purposes last aforesaid; by means whereof the said plaintiff, during all the time aforesaid, was not only prevented and hindered from obtaining, and did not nor could obtain the said water in a pure, wholesome and unadulterated state, fit and proper for the uses and purposes of the said distillery, for the working thereof and for the making and manufacturing of whiskey therein as aforesaid, but by reason of the said water having been, and being so rendered impure, unwholesome, unfit and improper for the purposes aforesaid, he the said plaintiff hath been, and during all the time aforesaid was, and *still* is, prevented and hindered from obtaining or extracting, and did not nor could not, nor can he, obtain or extract the ordinary and usual quantity or proportion of spirit or whiskey from the grain during the time aforesaid used and consumed, or that may be hereafter used and consumed, in the said distillery, in the making or manufacturing of whiskey therein, by one-third of the amount or quantity which during the time aforesaid could and might have been, and still could and might be, obtained and extracted, had the said water remained pure, wholesome and unadulterated; and also the said plaintiff, by using and employing the said water during the time aforesaid, so being and having been rendered impure, unwholesome, and unfit and improper for the uses and purposes aforesaid (he the said plaintiff not knowing the same to have been so rendered impure, unwholesome, and improper for such purposes), obtained and extracted from the grain so used and consumed by the said plaintiff, in his said distillery, *during the time aforesaid, a much smaller quantity, to wit, 75,000 gallons of whiskey (and which would have been of great value, to wit, of the value of 750*l.* of lawful money of Canada) less than he could and might and would have obtained and extracted therefrom, had the said water, during the time aforesaid, been and remained and continued in its pure, wholesome and unadulterated state, but also the said whiskey or spirit, so during the time aforesaid obtained and extracted therefrom, to wit, 150,000 gallons of whiskey, and which otherwise would have been of great value, to wit, of the value of 1,500*l.* of lawful money aforesaid, was, by reason of the premises, greatly flavoured and impregnated with the said gas-tar, coal-tar, and other noxious, unwholesome, deleterious and offensive matters and substances aforesaid, so as aforesaid by the said company cast, discharged and thrown into the said waters of the said bay, and was thereby rendered unpalatable, unsaleable, unmarketable, wholly useless and spoiled; and also the said plaintiff, by reason of the committing by the said company of the said grievances, hath been and *was and still is prevented and hindered from carrying on his said business with profit or advantage, and hath been and was and still is obliged and compelled to abandon and discontinue the same, and hath lost and been deprived of divers great gains and profits, in all amounting to a large sum of money, to wit, the sum of 2,000*l.* of lawful money aforesaid, which he might**

and could and otherwise would have made and realised, by carrying on and continuing his said business, and also the said messuage and distillery, and all and singular the stock, implements and utensils, boilers, tubs, casks and machinery therein and thereunto belonging and used and employed by the said plaintiff in his said trade or business, being of great value, to wit, of the value of 3,000*l.* of lawful money aforesaid, have, by reason of the premises, become and were *and still are* wholly useless and of no value to the said plaintiff. And also the said plaintiff, *during the time aforesaid*, by reason of the premises, was forced and obliged to *and did necessarily pay, lay out and expend divers large sums of money*, in the whole amounting to a large sum of money, to wit, the sum of 500*l.* of lawful money aforesaid, in and about the construction of divers, to wit, three rectifiers, by the said plaintiff, *during the time aforesaid*, for the purpose and with the view of rectifying and purifying the said whiskey (so during the time aforesaid made and manufactured as aforesaid) from the said gas-tar, coal-tar, and other noxious, unwholesome, deleterious and offensive matters and substances aforesaid, with which the same was so flavoured and impregnated as aforesaid, constructed and built, and in and about the making and digging of divers, to wit, six wells, by the said plaintiff, during the time aforesaid, made and dug, and in and about the procuring and laying down of divers, to wit, 500 feet of leaden water pipe and 500 feet of wooden pipe, by the said plaintiff during the time aforesaid procured and laid down, and extending from the said distillery into the said bay, and in and about the endeavouring and attempting to procure good, pure and wholesome water for the working of the said distillery, and for the making and manufacturing of whiskey therein as aforesaid, in the place of the said water so rendered impure, unwholesome, and so corrupted, adulterated and deteriorated by the said company as aforesaid, and hath been and is otherwise greatly injured and damaged."

Demurrer to declaration, for that the prescription therein mentioned *is double*, being claimed *both in respect of a messuage or distillery, and lot or parcel of land*; and uncertain, being claimed in respect of a *messuage or distillery*.

Also, because the said prescription *is too large*.

Also, because the waters of the Bay of Toronto *are public navigable waters*, and no such claim of right as prescribed can exist thereto.

Also, because such use of the waters of the said bay is not claimed of right; nor is it stated or shewn that such use of such waters has of right, or otherwise, belonged to the possession of the said messuage or distillery, and lot or parcel of land.

Also, that *damages are claimed* in the said 1st count, for the said alleged grievances, *to a period subsequent* to the commencement of the action.

Also, that the said 1st count is in other respects uncertain, informal and insufficient.

Cameron, Sol. Gen., for the demurrer, cited Gale & Wheately on Easements, 8, to shew that plaintiff could not claim the use of the water by reason of a joint-right, the possession of the land *and* the possession of the distillery. He cited Str. 469; 1 H. Bl. 366; Moffatt v. Roddy, Easter Term, 1838, in our own court; 12 E. R. 429;



1 Esp. N. P. C. 148 ; 2 A. & E. 452 ; 8 A. & E. 314, to shew that the plaintiff had no private right to the use of public navigable waters, such as Lake Ontario, in a pure and wholesome state.

The Hon. *R. B. Sullivan*, Q. C., contended that the easement was not claimed by any double title ; that the plaintiff had merely stated his possession of land to shew how he had been affected by the injury. He cited *Chitty, Jr. Pre.* 498, note C. 581 ; 2 *Chitt. Plead.* 545 ; 4 *Taunt.* ; 4 *E. R.* 107. There was nothing, he submitted, in the objection, that damages had been claimed for a time subsequent to the commencement of the action.—11 A. & E. 301 ; 5 B. & C. 269 ; 1 *Salk.* 11 ; 7 *M. & W.* 456.

There could be no doubt now, from the case of *Wilkes v. the Hungerford Market Company* (2 *Bing. N. C.* 281), however much the law may seem to have been questioned in earlier decisions, that a private individual, sustaining a distinct injury from the deterioration of public navigable waters, has a right of action against a party injuring the water.—1 *M. & S.* 578 ; 3 *Kent. Comm.* 437 ; *Angel.* 204, 210.

*ROBINSON, C. J.*, delivered the judgment of the court.

Upon the principal question in this cause, our opinion is in favour of the plaintiff.

I think the injury of which he complains gives him a good cause of action, and that the only doubt is, whether his declaration is well framed.

In regard to the right of action, the defendants maintain, that the nuisance complained of, if it be a nuisance at all, is one which, from its nature, can only be treated as an injury to the public, being an alleged deterioration of the waters of Lake Ontario, which is a public navigable water, in which the plaintiff can have no peculiar interest or easement, and in respect of which, therefore, he can maintain no private action.

They contend, that the proper and only remedy in such cases is by indictment ; and they rely upon *Hubert v. Groves* (1 *Esp. N. P. C.* 148), and of the *King v. the Directors of the Bristol Dock Company* (12 *E. R.* 427).

With respect to *Hubert v. Groves*, Lord Kenyon, who tried the cause at *Nisi Prius*, took the ground, that because the injury was to the King's Highway, and a public nuisance, the party's remedy was by indictment only ; and though the cases of *Hart v. Bassett* (Sir J. Raymond) and *Iveson v. Moore* (1 *Salk.* 15 ; 1 *Ld. Rayd.* 486), were cited, and it was proved that the plaintiff sustained a distinct peculiar damage to his business by the obstruction of the highway, his lordship nonsuited the plaintiff ; and it is stated, that the court in banc concurred in opinion with the Chief Justice, and refused a rule to set aside the nonsuit.

The authority of this case, however, is not now recognised, and it is manifestly inconsistent both with the earlier and later authorities.

One can only account for the decision, by supposing that the evidence shewed too slight a foundation for complaining of any peculiar injury, to take the case out of the general rule, which is undoubtedly a wise and reasonable one.

It is to be expected that attempts will sometimes be made to claim an individual right of action upon such slender grounds, that if it were admitted the rule would become inoperative. *Hubert v. Groves* may



have seemed to the judge at the trial to be one of that kind, though that is not made plain in the statement of the case, and the decision is not at the present day treated as an authority.

The other case, of the Bristol Dock Company, was fifteen years later, and came before very eminent judges. It is difficult to reconcile the decision with the plaintiff's right to bring an action in the case before us. That judgment seems to have been but little canvassed, though it does appear to be at variance with many other cases both before and after it, and especially with *Rose v. Miles* (4 M. & S. 101), which was decided by some of the same judges.

The case of the Bristol Dock Company was not the case of an action brought for an alleged nuisance, but it was an application to the court, under a statute, for a *mandamus* to compel certain commissioners to make compensation for damages which they had occasioned to an individual, by carrying on a public work which they were authorised to construct.

It may have seemed to the court, that the injury complained of was not the kind of damage which the statute intended should give a claim to compensation, being an injury to the business of the plaintiff, and not directly to his building or tenement; but when we look at the words of the Act of Parliament, it seems not easy to account for the decision on that supposition; for they are very comprehensive, and the court do certainly give reasons for their judgment which are independent of the statute, and apply to the principles by which all actions of this kind are to be governed; but in doing so, they certainly seem to have lost sight of the peculiar grounds of damage—very substantial, certainly—on which the plaintiff founded his claim.

These are very plainly and strongly stated, and are explicitly acknowledged in the later case of *Rose v. Miles*; and it is hard to understand how the same judge could have held, in the one case, the doctrine which he is reported to have held in the other. It is embarrassing, certainly, to meet with such a case as that of the Bristol Dock Company, while we are called upon to pronounce upon the question before us; for in its circumstances, it more closely resembles the present than any other that can be found. And yet we cannot venture to abide by it, when it is found to be plainly opposed to other authorities, and opposed to reason and justice, as it seems to me.

In a case before Baron Wood, at the Durham assizes, tried two years before, and reported in a note to 1 Camp. 517, the principle is laid down in accordance, as it appears to me, with reason and authority. "A navigable river," he says, "is a public highway, and all persons have a right to come there in ships, and to load and unload, and stay as long as they please; *nevertheless, if they abuse that right, so as to work a private injury, they are liable to an action.*"

Now, looking at the waters of this bay as navigable waters, the right of the public to use them as a highway gives of course no right to throw poisonous or noxious matter into the waters; and if they do this for any purpose, they must shew a legal authority for what is *primâ facie* a wrong, or they must answer to the public for what may be a public nuisance, and to individuals (for so I take the law to be well settled) for any special or peculiar damage which they may receive in the exercise of their lawful rights, from such unlawful act.

The case of *Wilkes v. the Hungerford Market Company* (2 Bing. N. C. 281) fully maintains the right of individuals in such cases to bring an action, and I can conceive no sensible ground on which we could hold, that an injury of this description done to the quality of the water which all have a common right to use, will not give a right to an action, as well as an injury occasioned to an individual by obstructing him in the use of the water for purposes of navigation.

Whatever may be proved to have been the case in fact, the injury stated in this record is certainly a very grievous and substantial one.

The right to use the water for any purpose not interfering with public rights, or other private rights resting on the same common foundation, cannot be denied; and if the plaintiff had, as I think he had for all that appears, a right to have and use his distillery, and to supply it with water from the bay, he might no doubt be ruined, and not merely injured, by such an injury as he has here complained of.

How truly he has complained of it, is not now the question.

But we are of opinion that both counts are insufficient, by reason of the objections urged against them, that the plaintiff claims in them the right to the use of the water by reason of *the possession of the messuage or distillery and of the land*, thus resting his right upon two or three grounds, leaving it uncertain which, when he could not in law claim a right upon any such ground, but simply upon the same common right to use the water for any purpose which every other person had, not by any prescription, not by occupancy, not as an easement annexed to any house or land, but merely by the same right as he and all others have to go anywhere else upon Lake Ontario, and take water for their purposes, whether they possess any house or land upon its banks or not—the same right, in short, that any person has, not to die of thirst upon the banks of a navigable water which is by law accessible to all.

It was no doubt right and reasonable to state the plaintiff's possession and use of the distillery, as shewing how he came to sustain a great and special damage; but the plaintiff should not have grounded his right to the water expressly, as he has done, upon the fact of his possession of the messuage and land.

The other objection, that damages are claimed for an injury stated to have been committed, or at least continued, after the action was commenced, seems to me to have at least so much force in it, that the plaintiff will do well to amend in that particular, as well as in the last adverted to.

It is true that in England, since the Uniformity of Process Act, as well as before, and although the suing out process is there as well as here the beginning of the suit, the form of declaration used in such cases as the present, does still as formerly, retain the statement of "*adhuc existit*," as this declaration does; and they seem in this respect liable to exception, as claiming damages up to the time of declaring. Indeed, Mr. Chitty (2 Ch. Plds. 583), says that in some cases this *adhuc existit* would be improper, and yet he retains it in all the forms, I think, which he has given, without explaining why it would be more safe to do so in those instances than in any others.

In *Carter v. Canthrope* (4 Mod. 153) the court treated those words as mere words of form, used in most declarations, not intended to claim

damages beyond the commencement of the suit, but inserted merely to shew that the defendant had not abated the nuisance.

Without going more into this point, which is discussed in a note to 2 Saunders, 171, I will only add, that the pleadings in both counts are such, as to make them more open to the objection than they would be in such a case; the manufacturing of large quantities of whiskey, which proved to be unsaleable, from the manner in which the water had been damaged, and which is alleged in order to prove the special damage, being so stated as that it may at least be said, it does not appear to have been a damage accrued before the action brought, or by reason of any act done by the defendants before the action brought; and the same may be said of the manner in which the statement is made, of the defendants throwing the coal-tar, &c., into the water.

This is not like the more common case of some act done which occasions a continuing injury, as the erection of a dam, &c.; but the damage to the water was occasioned day by day, as the noxious matter was thrown, and could not have continued to be felt for any length of time, unless the injury had been constantly renewed.

The plaintiff should frame his declaration, confirming his statement of injury and his claim for damage, more clearly to the period preceding the commencement of his action.

*Per Cur.*—Judgment for the defendants on the demurrer, with leave to the plaintiff to amend, paying costs.

---

---

## PRACTICE COURT.

HILARY TERM, 10 VICTORIA.

---

Before the Hon. MR. JUSTICE MACAULAY.

---

### THE QUEEN v. CAMERON, IN THE SUIT OF PLAYTER v. CAMERON.

Where expenses have been vexatiously incurred in the conduct of a suit by the attorneys on both sides, the court, to protect the client, will order an attachment for non-payment of costs, though regularly issued, to be stayed *without costs*, upon payment of the money due.

This was a rule, moved for by *D. G. Miller*, calling on Playter to shew cause why a rule for attachment, the attachment, and all subsequent proceedings, should not be set aside with costs, on grounds disclosed in affidavits and papers filed, with leave to use all the papers on which said writ was granted.

The facts were, that on the one hand the plaintiff was entitled to 4*l.* 12*s.* 3*d.* costs of setting aside an irregular judgment of *non pros.*, and the defendant to costs of setting aside a regular nonsuit.

That it was mutually agreed between the attorneys of both parties, that the former should be deducted from the latter; but nothing definite



was done. And so it remained, till the plaintiff's attorney, without giving any notice of his intention to recede from this understanding, on 20th June, 1846, served the rule and allocatur for the costs of *non pros.* on the defendant, and demanded the same.

That (apparently) on the same day, the said costs were repeatedly tendered to him by the defendant's attorney, which he refused on captious and insufficient grounds, except that the tender by the defendant's attorney was not in specie—an objection not renewed upon a subsequent tender.

Notwithstanding this, the plaintiff moved for an attachment, which was at first ordered on the usual affidavit, but revoked upon the explanation of the defendant's attorney, and two weeks were given to the latter to pay the costs, which were not paid.

After this, the defendant's attorney proceeded to enter judgment on the nonsuit, and though repeatedly solicited by the plaintiff's attorney, refused, without any reason, to deduct the costs of *non pros.* from the costs of such nonsuit, but proceeded to enforce and was paid the same in full.

That after this, the plaintiff's attorney again demanded the costs of the *non pros.* from the defendant and his attorney. who refused to pay the same; but he did not reserve the rule and allocatur; and in last term, renewed the application for an attachment, notwithstanding the explanation and objections of the defendant's attorney, and to whom additional time to pay the costs was refused. It did not appear that the defendant had been arrested, or any proceedings had on the attachment.

*Brooks* shewed cause.

MACAULAY, J.—The proceedings appear to me to be vexatious and captious on both sides.

In the first place, on Mr. A.'s part, in receding from the understanding to set off the costs, and proceeding formally to demand the costs from the defendant, without previous notice of his intention to abandon the promise to set off; again, in refusing to accept the costs when tendered, without any apparent reason; again, in expecting, that, in addition to the costs upon the allocatur, 4*l.* 12*s.* 3*d.*, he was to be allowed to set off the costs of an attachment, to which (in that event) he could have had no pretence.

On Mr. B.'s part, in not paying the costs within two weeks, the time given by Mr. Justice McLean; still more, in refusing to deduct those costs from the costs of nonsuit, though repeatedly requested, but proceeding to exact the full amount thereof, and afterwards refusing to pay those costs when again demanded, after he had received the costs of the nonsuit in full.

When this attachment was moved, last term, the court refused to withhold it on Mr. B.'s opposition, not apparently on the ground that the facts were not stated on affidavits, but because the money was not paid, and further time was then refused.

All the facts seem to have been then suggested to the court, but I do not understand that the insufficiency of the second demand was then objected.

The defendant was strictly in contempt, upon his default in payment



when the rule and allocatur were served upon him ; but before any steps were taken to attach him, the money was paid by him to his attorney, and tendered to the plaintiff's attorney and refused.

After this, I doubt much whether an attachment could regularly be obtained, upon a subsequent demand, or whether a new order should not be moved for and served, upon an affidavit of the circumstances.

As it is, the proceedings are vexatious, and the attorneys for both parties seem to have been unnecessarily captious; and when it is remembered that the proceedings in this court are supposed to be carried on for the benefit and at the expense of their clients, it becomes the more objectionable and extraordinary. I think it very unreasonable that the expenses that have been so unnecessarily incurred should fall upon the clients of either; and it appears to me, that upon payment of the 4*l.* 12*s.* 3*d.* forthwith, the attachment should be stayed without costs.

*Per Cur.*—Attachment stayed without costs.

COMMERCIAL BANK V. HUGHES, LEE AND COTTENHAM.

COMMERCIAL BANK V. HUGHES, COTTENHAM, HUGHES AND BURTON.

The plaintiff sues A., B. and C. on a joint-contract. B. allows judgment to go by default. The plaintiff, failing to prove the joint-contract, accepts a nonsuit as to B. and C., and takes a verdict against A. A. moves in term to set the verdict aside. B. and C. are not made parties to the rule. The court make the rule *nisi* absolute. The order is not served on B. and C., neither do they adopt or act upon it. B. and C. afterwards enter judgment on the nonsuit, which the plaintiff moves to set aside.

*Held*, that B. and C., not being parties to the rule *nisi*, are not bound by the order made thereon, unless they can be shewn to have been served with it, or to have adopted or acted upon it.

*Held also*, that in joint-actions of assumpsit, a mis-joinder of the defendants cannot be cured, either by a *nolle prosequi*, or by a nonsuit as to some of the defendants; that a nonsuit as to some, is a nonsuit as to all; and that a verdict returned for some of the defendants, is null and void.

*Semble*, that rules *nisi* do not become rules absolute, though ordered to be made so by the court, until after they are drawn up or issued.

These were rules granted on the 1st day of term, calling on the defendants to shew cause why the judgments of nonsuit entered in these causes, and all subsequent proceedings, should not be set aside for irregularity, with costs, on the ground that verdicts were rendered in the first case against Josias L. Hughes, and in the second against Francis H. Burton, defendants therein, and a nonsuit in favour of the other defendants respectively; and that a new trial was granted afterwards as to all the defendants; but that judgments of nonsuit had been entered up notwithstanding, and on grounds disclosed in affidavits and papers filed.

These actions were brought against the maker and endorsers of promissory notes exceeding 100*l.*, and not within the statute authorising the parties to be sued jointly and severally.

The defendants had all pleaded to issue; and the misjoinder being objected to at the trial, the plaintiffs endeavoured to correct it by accepting a nonsuit as to all the defendants in each case except one; and as to such defendant, verdicts were rendered in the plaintiffs'

favour for the amount of their demand, the entry being as follows :—  
 “ Verdict for the plaintiffs against Hughes ; damages, 206*l.* 4*s.* 8*d.*  
 “ Nonsuit as to Lee and Cottenham.” In the 2nd, “ Nonsuit as to all  
 “ the defendants except Burton ; and damages assessed against him on  
 “ account stated at 206*l.* 2*s.*”

In the following term (last Michaelmas), the defendants against whom verdicts had been rendered, moved and obtained rules, calling on the plaintiffs to shew cause why the verdicts obtained in the said causes should not be set aside, and new trials granted, as to the defendants against whom they had been respectively rendered, on the ground that such verdicts were against law and evidence ; or why judgment should not be arrested as to such defendants.

These rules were made absolute, on the second Tuesday after term, to set aside the nonsuits, verdicts and assessments, and for a new trial between the parties, but had never been taken out or served ; and on or after the 4th day of January last, judgments of nonsuit were entered generally for all the defendants, against the plaintiffs, and executions issued for costs.

Proceedings thereon had been stayed by judge's order till this term.

The judgments of nonsuit recited the *postea*s, stating that the jurors, being agreed, returned to the bar to give their verdicts, whereupon the plaintiffs, being called, came not, but made default as to the defendants Lee and Cottenham, and Hughes, Cottenham and Hughes respectively, nor did they further prosecute their suits against the said defendants respectively ; and as to the defendant Josias L. Hughes, they found the issues for the plaintiffs, and assessed damages on the 1st count at 206*l.* 4*s.* 8*d.* ; they also found the issues in favour of the plaintiffs against Burton, and assessed the damages at 206*l.* 2*s.*, and then proceeded in each judgment. Wherefore it is considered that the plaintiffs take nothing by their suit, and that they be in mercy, &c., and that the *said* defendants do go thereof without day, &c. ; then final judgments were entered for all the defendants for costs.

*Dalton* shewed cause against these rules, contending, 1st, that the defendants, as to whom the plaintiffs were nonsuited, were no parties to the rules for setting aside the verdicts, nor had they *notice* of such rules, or of the court having ordered the nonsuits to be set aside ; and that without service thereof, they were not bound thereby. 2ndly, that a nonsuit as to one or more defendants in a joint-action, is a nonsuit as to all ; and that, therefore, the judgment was rightly entered. 15 Vin. Abr. Nonsuit, G. H. ; Noy. 139 ; 4 M. & W. 502 ; 13 M. & W. 811 ; 14 Law Jou. 305, N. S. ; 1 Dowl. N. S. 16, *ib.* 449 ; 5 B. & C. 768 ; 1 D. & L. 912 ; 1 M. & G. 50.

*Cameron*, Sol. Gen., in reply, objected to the entry of judgment of nonsuit, as not having formally disposed of the verdicts against the defendants Hughes and Burton, on the face of the roll, previously to entering the general judgment of nonsuit. 2ndly, that the orders granting rules absolute for new trials should have been got rid of by motion, before entering such judgments. That while they subsist, they bind all parties ; and the judgments are therefore irregular. That although not taken out or served, the plaintiffs recognised them as between themselves and the parties who moved and obtained them ; and

that as to such defendants, at all events, they were binding, and could not be waived or treated as nullities. 3rdly, that in the *postea* no judgment of nonsuit can be entered. That it is error and irregular; and that the defendants, as to whom the plaintiffs were nonsuited, had no right to enter judgment generally for all the defendants, including those against whom verdicts had been rendered, &c.—2 Ch. Arch. Pr. 1190; 4 Taunt. 253. That there cannot be a nonsuit as to one defendant, and a verdict as to another.—2 M. & P. 18; 4 Taunt. 253; 5 B. & C. 768.

MACAULAY, J.—The defendants, as to whom the plaintiffs were nonsuited, were not made parties to the rules *nisi* for new trials, nor are they bound by the orders made thereon, not having adopted or acted upon them.—13 M. & W. 811; Doe dem. Dudgeon v. Martin et al., and note Belcher v. Mangay et al. 14 Law J. Ex. 305.

It appears by the affidavits of Mr. Brock, that the defendants, who obtained the rules *nisi* for new trials, did not take out or serve rules absolute; and the plaintiffs rely upon an election to notice the orders made thereon without service, and assert that they did so notice them as respected those defendants on whose behalf they had been moved; but if so, I think it was incumbent upon them to have taken out and served the rules upon the other defendants, and indeed on all.

In the absence of such steps, the defendants not parties thereto were not bound by them, and the defendants who moved them might abandon them.

If the latter could not abandon them without giving notice thereof, still they would not bind the other defendants, who were in effect strangers to them, without service upon them.

The orders for setting aside the nonsuits were improvidently made, in the absence of the defendants to be affected thereby, and I think they were not bound to notice them.

The rules *nisi* never in fact became rules absolute; for although ordered to be made absolute, no rules absolute were ever drawn up or issued.

I am induced therefore to look upon the question as it stood at the close of the case at Nisi Prius, or as if no orders had been made for new trials, or for setting aside the nonsuits; and it seems clear, in joint-actions of assumpsit like this, a misjoinder of defendants cannot be cured, either by a *nolle prosequi* or a nonsuit as to some of the defendants, and that a nonsuit as to one is a nonsuit as to all. In addition to the cases cited by Mr. Dalton, I would mention 1 Sid. 378; Blakey's case, cited in 1 Wil. 89; 3 Sal. 244, pl. 3, 4; 1 Lev. 65; Porter v. Harris.

The release of one of several joint-contractors will operate as a discharge of all; and in a joint-action against several in assumpsit on an alleged joint-contract, the plaintiff cannot enter a *nolle prosequi*, or elect to be nonsuited or out of court as to some of the defendants only.

If he abandons the suit as to some, it operates in favour of all. This view was not suggested to the court during the argument of the rules *nisi* for new trial; if it had been, it is probable they would have been discharged on that ground.



My attention having been now directed to the subject, I certainly think the plaintiffs are out of court as to all the defendants, and that the verdicts entered against some of them are null.

The necessity of any entry between the *postea* and the general judgment as entered, was not made a ground of the present application, and if it had been, I should think it would have failed; for if the legal effect of a nonsuit as to some is a nonsuit as to all, the judgment is rightly entered according to such legal consequence.

The verdicts appear on the face of the record to have been unauthorized and null. The case of *Rivett v. Brown* (2 M. & P. 18) is not quite in point. The question was not before the court in its present shape; and if it were in point, it adopts the text in *Tidd's Practice*, that there cannot be a nonsuit as to some defendants, and a verdict against others, treating both as irregular; whereas the dictum of *Tidd* was expressly denied in *Murphy v. Doulan et al.* 5 B. & C. 178, which seems to overrule the three cases cited by *Tidd*, so far as they held that after judgment by default against one of several defendants, the plaintiff could not be nonsuited. — Cro. 483; 1 Bur. 350; 3 T. R. 662.

Upon the whole, therefore, I think these rules should be discharged with costs.

*Per Cur.*—Rule discharged with costs.

---

#### OLIPHANT V. MCGINN.

The court will order judgment to be entered upon a cognovit seven years old, upon an affidavit from the plaintiff stating that, having recently received a letter from the defendant, he believes him to be still alive, though the affidavit does not state that the defendant wrote or signed the letter.

This was an application for leave to enter judgment on a cognovit, dated 10th January, 1840, true debt 102*l.* 16*s.*, payable 1st May, 1840, on affidavits of the plaintiff and his attorney that the whole remained due, and that the plaintiff verily believed that the defendant was then (29th January, 1847) living, having received a letter from him, dated at Caledonia, on the 23rd November, 1846, not stating that the letter was written or signed by him.

MACAULAY, J.—The letter is not alleged to have been written or signed by the defendant, nor is it stated where Caledonia is; it is said to be in the Gore District. Nor is the *time* within the cases in relation to warrants of attorney; but being a cognovit, and the application under a *practice* of our own, I feel at liberty to presume the defendant's being alive, and grant the order.

*Per Cur.*—Rule absolute.

---

#### HUNTER V. THURTELL ET AL.

A party moving to set aside the proceeding of another for irregularity, must be strictly regular in his own. When, for instance, a party takes out a four-day rule on the Wednesday before the end of the term, and neglects to serve it till Friday, the court will not allow him to amend his rule so as to make it returnable on Saturday.

On the second Wednesday in Hilary Term, 1847, a rule *nisi* was



moved and granted for setting aside the *service* of the *ca. re.* on one of the defendants, for irregularity.

The copy had been served in Toronto, on the 5th February previous, the writ being returnable the last day of the term. Various objections were made to the copy served, as not being a literal copy of the original.

MACAULAY, J.—All the variances are trifling, and not calculated to mislead. The rule was granted in the usual way, without appointing any particular day to shew cause; it was therefore an ordinary four-day rule.

It was issued on the 10th; and had it been served that day, the time for shewing cause would have been on Saturday, the last day of term; but it was not served, and on *Friday* the court was applied to, to order it to be made returnable the next day; this was done, subject to consideration.

By the practice, ordinary rules to shew cause, expressing no particular day, are understood to require cause to be shewn on the fourth day after service. Sometimes the period is limited, by naming a day.

On Saturday cause was shewn, and the amendment allowed the day previous objected to, as aiding a captious proceeding, contrary to the well-settled rule, that where a party excepts to the proceedings of the other side, as irregular, he should himself be regular; and if not, that the court will not aid the application by any amendment.

On consideration, I discharged the rule on this ground, not thinking that in support of such objections as had been made to the copy served, the court should deviate from the strict rule, as respected the defendant. He might have served the rule *nisi* on Wednesday, and had he done so, he would have been entitled to the full benefit thereof; but having omitted to do so, and remaining still till late in the day on Friday before asking for an amendment, he ought not to be assisted.

The rule was granted as moved, and not being served before Friday, a service on that day would be unavailing, as four days did not remain of the term.

The effect was, that the rule would have lapsed; and such being the case, I do not think the court should, by its special intervention, sustain it in aid of the party who had not been diligent in serving it.

*Per Cur.*—Rule discharged without costs.

MASECAR V. CHAMBERS ET AL.

When the time for making an award is enlarged, the enlargement, as well as the original submission, must be made a rule of court.

Where money by the award is to be paid to the plaintiff or to the plaintiff's attorney, the attorney cannot substitute another attorney under him to receive the money.

The affidavit for an attachment is bad, in not denying payment of any part of the sum demanded.

The commissioner taking the affidavit need not state himself to be a commissioner.

This was an application by *W. Eccles*, for an attachment for non-performance of an award.

A rule was granted last Michaelmas Term, upon reading the award and papers filed, calling on the defendants to shew cause this term why an attachment should not issue against them for non-performance of the said award, and for non-payment of 30*l.* 4*s.* 5*d.*, pursuant to the master's allocatur made therein.

*A. Wilson* shewed cause for the defendants.—He objected, that by the rule of *Nisi Prius*, the award was to have been made on or before the 1st day of Easter Term last (*viz.*, Monday, 8th June, 1846), but that it was not made till the 15th June, and so too late.

The time for making the award, under the rule of reference, was enlarged by the parties till the 15th of June, 1846; but that enlargement was not made a rule of this court,—the original rule at *Nisi Prius* only being made a rule of this court.—8 Dow. 130–1; 5 Dow. 513.

2ndly, That the power of attorney under which the demand was made, was made by the plaintiff's attorney substituting an attorney under him, without any authority shewn.

3rdly, It did not appear that a copy of the power of attorney was served. The words of the affidavit are, "that to each of the said copies of award (alleged to have been served) was annexed a true copy of the power of attorney annexed, the original whereof he also shewed," &c.

4thly, That the affidavit denied payment of the said sums of money, or any or either of them; but not of any part thereof.—8 Dow. 891.

5thly, That the power of attorney was not verified by affidavit, no affidavit of execution thereof appearing.

6thly, That the affidavit of Coldham did not appear to have been sworn before a commissioner; only thus, "Sworn before me, at Simcoe, in the Talbot District, the 9th day of November, 1846.—(Signed) Robt. Nichol."

7thly, That a demurrer was not shewn to have been disposed of. It should have been adjudged of, and result shewn.—9 M. & W. 60.

MACAULAY, J.—The 1st objection is a valid one.

It seems clear, that when the *time* for making an award is enlarged, the enlargement, whether by the parties, the arbitrators, or by judge's order, should be made a rule of court, as well as the original submission.

The 2nd objection seems also good. The money is, by the award, to be paid to the plaintiff's attorney, or to the plaintiff or his attorney. This does not extend to the attorney of the attorney.

The plaintiff's attorney, on the record, has not an implied authority to substitute other attorneys under him to act as attorneys for the plaintiff, according to the rule of "*delegatus non potest delegare*."

It also seems necessary that the payment of the whole sum of 16*l.* 5*s.* by the plaintiff, should be shewn by affidavit, to entitle the plaintiff to demand a moiety thereof.

I think that the affidavit stating that to each copy of the award served was annexed a true copy of the power of attorney, is equivalent to saying, that with each copy of the award was served a copy of the power of attorney.

The affidavit is strictly objectionable for not denying payment of *any part* of the sum demanded, though the case cited (8 Dow. 891, Payner

v. Hatton) is not exactly like it. There, the affidavit denied payment of the sums (two) demanded, or any part thereof; and the objection was, that it did not say, "or either of them." The objection to the present affidavit is stronger; the rule was there discharged with costs.

There is no affidavit of the execution of the power of attorney, as there should be.

The jurat of the affidavit of Coldham seems sufficient, according to the case of *Henderson v. Harper et al.* (2 U. C. R. 97), followed by me in chambers since last term.

As to the demurrer, the allocatur imports that it was decided in the plaintiff's favour; and by the reference, the costs were to follow the result. The allocatur is of costs taxed to the plaintiff, on the issues of fact and law.

The rule must therefore be discharged with costs.

*Per Cur.*—Rule discharged with costs.

#### HEATHERS V. WARDMAN.

If the rule of this court is informal in its entitling, the plaintiff must move to set it aside; while it continues in force, it must be obeyed, though not regularly entitled.

The affidavit proving an award, must shew that it was executed within the time limited by the submission.

The allocatur may or may not embrace a moiety of the costs of reference.

The affidavit of the plaintiff, denying service, must be entitled in the cause, and not the *Queen v. Defendant*, as it is an affidavit made before the attachment has been ordered.

If the affidavit, however, contain a good answer upon the merits, the plaintiff will have leave to swear to an amended affidavit.

This was a rule, obtained by *J. H. Hagarty*, calling on the plaintiff to shew cause why an attachment for contempt should not issue against him, for non-payment of 33*l.* 19*s.* 1*d.* costs, awarded to be paid by the plaintiff to the defendant.

*J. C. Morrison* shewed cause.

He objected, 1st, that the order of this court, making the rule of *Nisi Prius* a rule of this court, was not entitled in the cause.

2ndly, That the affidavit of the execution of the award did not say *when* it was executed, but merely that it was duly executed. It should appear to have been executed on the day of the date.—2 C. & J. 398; 1 Tyr. 354, note; 6 Taunt. 254.

3rdly, That the *allocatur* did not distinguish between the costs of the cause and of the award.

*J. H. Hagarty*, for defendant, objected to the entitling of the plaintiff's affidavit: it should have been in the cause, and not the *Queen v. Defendant*, as no attachment had been yet ordered.

MACAULAY, J.—Strictly, the rule of this court ought to be entitled in the cause; but the rule as drawn makes the rule of *Nisi Prius* a rule of this court; and the rule of reference is so entitled. If the rule of this court is informal, the plaintiff should move to set it aside; but while it continues in force, I apprehend it is no excuse for disobedience of it, that it is not regularly entitled. It is substantially correct, and cannot

mislead. It is not void, or a nullity.—6 Dow. 384; 4 Scott, 299; 1 W. W. & D. 587.

2ndly, The affidavit of the execution of the award is not specific as to time; it only states that the witness thereto saw the award duly executed, without saying *when*; and time is material. And the affidavit is sworn after the limited time for making the award. In 1 Tyr. 354, note, it is said the time should be shewn.—2 C. & J. 398; 6 Taunt. 254, *Wohlenberg v. Lageman*; this case does not decide it to be a fatal objection, but intimates that the form in the books should be amended, and made more specific. The usual presumption is, that an instrument was executed on the day of the date, till the contrary appears; but here the affidavit of execution does not follow the usual forms. Since the case of *Wohlenberg v. Lageman* (6 Taunt. 254), it seems to have been considered necessary, that the affidavit proving the award should shew that it was executed within the time limited by the submission; and it is more important when the affidavit is sworn after the expiration of such period.

The allocatur may or may not embrace a moiety of the costs of reference: if it does not, it contains no excess; if it does, it must be intended, till the contrary is shewn, that the payment was proved by the defendant to the satisfaction of the master, before he allowed it.—1 W. W. & D. 587.

The plaintiff's affidavit is wrongly entitled, and cannot be read.—7 T. R. 439, *R. v. Sheriff of Middlesex*. But as the facts stated constitute a good answer on the merits, it would be proper that he should have leave to swear to an amended affidavit, if the result depended upon it.—6 Dow. 384.

But strictly speaking, under the 2nd objection, I think the rule should not be made absolute. The better way would be to enlarge the rule, with leave to both parties to file amended affidavits before the first day of next term.

*Per Cur.*—Rule enlarged, with leave to both parties to file amended affidavits before the first day of next term.

#### DOE EX DEM. DODGE v. ROSE.

Where a cause has been once taken down to trial, and made a remanet of, the defendant cannot afterwards obtain judgment as in case of a nonsuit in a country cause.

This was a rule calling on the plaintiff to shew cause why the defendant should not have judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice.

MACAULAY, J.—The cases shew that the cause, having been once taken down to trial, and made a remanet, the defendant cannot afterwards obtain judgment as in case of a nonsuit in a country cause (1 Dow. 371, *Brown v. Rudd*; 2 Dow. 153, *Gilbert v. Kincaid*); and being a second application, the rule should be discharged with costs.

*Per Cur.*—Rule discharged with costs.



## READ V. HILTS AND WALKER, BAIL OF POPPLEWELL.

Where judgment and execution have been obtained against bail, by returns of *nihil* to *sci. fa's*, without any knowledge on their part of the proceedings against them, until a levy is made by the sheriff: The court, though they cannot set aside the proceedings, will interpose, and let them into a defence to the action, upon payment of costs.

Where a sheriff is requested to return *non est inventus*, he need not seek the debtor; but if he does, and arrests him, the bail are discharged; and if the debtor escapes, no matter from what cause, the liability of bail does not revive.

This was a rule calling on the plaintiff to shew cause why the judgment signed in the cause, and all subsequent proceedings, should not be set aside for irregularity, with costs, on the grounds that Popplewell, the original debtor, had been arrested and taken in execution on the writ of *ca. sa.* issued in the original suit, before the commencement of proceedings in this action, of which the plaintiff's attorney, or his partner, had notice; or that the defendants should be admitted to plead, on the same grounds, and on grounds disclosed in affidavits and papers filed. The defendants had no knowledge of the *sci. fa's* that were issued against them; they were first made aware of the suit against them by a levy under a *fi. fa.*

MACAULAY, J.—No irregularity in the judgment and *fi. fa.* in this cause is shewn. The ground of the application is matter of defence to be pleaded; and it appears to me, that the rule is worded with sufficient precision on this head. The word *that* after *or* should be read *and*. It would have been better expressed, had the introductory passage, relative to setting aside the judgment and *fi. fa.*, been repeated; but it is plain enough as it is.

The interlineation in Mr. Macara's affidavit is noted with the initials of the commissioner, though not in the jurat; and I do not see that Hick's affidavit is open to the objection made to it. It is explained to consist in the jurat not stating that the deponent signed or made his mark to it in the presence of the commissioner, according to the rule of court. But if these affidavits were rejected, still the affidavits used in the former application, having been referred to by the plaintiff's counsel, supply the same facts; and even rejecting both Hilts' affidavits, the main facts on which this application turns appear in the affidavits of Beard and others.

There is no negative proof that Walker had not notice of the proceedings, nor is there any affirmative proof. There is no reason to presume he had.

I do not consider the former application. It was made on a different ground, viz., a render of the principal; and although such render and such need of relief, are inconsistent with that now taken, still it appears that the defendants' attorney (if not the defendants themselves) had no knowledge of the caption under the *ca. sa.* till after the discharge of the former rule. Under such circumstances, I do not think they should be precluded. Indeed, the Chief-Justice, in his minute, in discharging the summons, intimates that relief might be had, could the matter be pleaded as a legal defence.

It is not too late in other respects. Bail are often relieved after judgment and execution; and when the first intimation had of the proceedings is a recent levy upon their goods under a *fi. fa.*, it would be hard if they were to be shut out from a defence.—1 M. & S. 199, *Holt v. Frank*; 1 Sal. 262, *Lambton v. Collingwood*; 2 Ld. R. 1295.

As respects the duty of the sheriff, in a case left to be returned *non est inventus*, to fix bail, in addition to the case of *Mangay v. Morgan* (4 Q. B. 817), cited by Mr. Blake in the argument, I would refer to *Ward v. Stocking et al.* (Taylor, R. 288), and to *Barnes v. Donnelly and Kay*, in this court, and the cases there cited. These shew that it was not incumbent on the sheriff to seek the debtor, if requested to return the writ *non est inventus*; but having done so, and having arrested him, the bail were thereby discharged. *Popplewell* was taken out of their custody; and if afterwards suffered to escape, or if discharged without due caution or enquiry, or even if by reason of his fraudulent representations, I do not see that the liability of the bail revived.—9 M. 122, *Baker v. Ridgway*. The caption by the sheriff was equivalent to a render in discharge, and the bail seem to be entitled to the benefit of it.

At all events, it is proper that they should be allowed to plead, in order to raise the question, on payment of costs, being a second application, and summary relief against a regular judgment and execution, on condition that no action of trespass be brought for the levy or other proceedings under the *fi. fa.*

*Per Cur.*—Let the bail plead to action, on payment of costs.

---

#### SUTHERLAND V. MURPHY.

Where a debtor leaves the Province, and returns upon an agreement that he is not to be arrested, provided he immediately proceed to the settlement of his estate, and one of the creditors, upon his return, arrests him, alleging that he has broken the condition upon which he was not to be arrested, and the debtor applies to the court to set aside the arrest, the court will not discharge him from the arrest, but will leave him to his action on the agreement.

This was a rule calling on the plaintiff to shew cause why the affidavit of debt, the issuing of the *tes. ca. re.*, and all other proceedings in the case, should not be set aside with costs, and the bail-bond delivered up to be cancelled, on grounds disclosed in affidavits and papers filed.

The plaintiff having arrested the defendant contrary to good faith, on affidavit of the defendant that he left the Province in September, 1846, and returned under a written protection, signed by the plaintiff and other creditors, dated the 3rd of October, 1846, in the form of a letter to Mr. Burton of Port Hope, saying that as he had requested a letter to enable the defendant to return and adjust his affairs, the undersigned agreed and bound themselves not to take any proceedings to arrest or imprison him, upon any claim which they had against him, provided he the defendant should immediately proceed to the settlement of his estate, and provided also that any securities which they then held should not be vitiated thereby; and signed among others by the plaintiff. The defendant's affidavit also stated, that the plaintiff made and signed another paper, nearly similar in effect to the above, which was in the hands of J. S. Smith, Esq., of Toronto.

MACAULAY, J.—If the defendant cannot avail himself of the letter of protection, by plea in bar of final process against his person, it appears to me he must be left to any remedy that may be open to him for breach of the agreement; for upon the affidavits, not only is the effect of the letter as binding upon the plaintiff disputed, but the want of compliance on the defendant's part with the terms or conditions on which it was given, is alleged. The one is not quite consistent with the other; but the plaintiff himself asserts, that for the reasons assigned, he never considered himself bound by either instrument; and his attorney says he has repeatedly endeavoured to obtain some settlement of the plaintiff's demand, without effect. Under such circumstances, I do not think the court can, upon this summary application, discharge the defendant from the arrest.

*Per Cur.*—Rule discharged without costs.

---

THE QUEEN V. TOMB.

The affidavit of service upon which the rule for an attachment is founded, is good, though it state the service as made on the day of a certain month *instant*, without stating *the year*.

This was a rule, obtained by *J. Lukin Robinson*, calling on Denison, lessor of the plaintiff in an ejectment suit against the defendant Tomb, to shew cause why the rule for an attachment against the defendant for non-payment of costs of said suit, should not be rescinded, and the defendant discharged from custody under the writ of attachment obtained on said rule, on the ground that the affidavit, on which the rule was founded, did not state the *year* in which the rule and allocatur for costs were served, but merely that the same were served on the defendant on the 13th day of November *instant*.

The jurat of the defendant was "sworn at the city of Toronto, in the "Home District, this 13th day of November, 1846, before me, "W. C. Keele, a commissioner in Q. B., Home District." The body of it, made by the said lessor of the plaintiff, stated, service "*On the thirteenth day of November instant.*"

The consent-rule was dated 8th October, 1846; and the allocatur, 12th November, 1846.

*George T. Denison* shewed cause.

MACAULAY, J.—The forms of affidavit given in Tidd's and Archbold's Practice, and also in Chitty's Practice of the Law, state services as on the — day of — *instant* or *last*.

The jurat shews *when* the affidavit was sworn; and though sworn before the jurat was written, if in fact sworn at the time certified (and we can suppose the deponent reading it over, and deposing to it as read), the word *instant*, or *past*, or *last past*, must relate to the month in which sworn, or the past month mentioned, as the case may be.

When the fact stated in the body of the affidavit is only specified by reference to its supposed date, without its having any date, the case of *Hughes v. Brown* (a) is in point to shew that the jurat cannot be adopted as the date intended.

---

(a) 1 D. & L. 788; see also, 7 Scott, N. S. 517; 13 L. Jour. N. S. 73; 6 M. & G. 751; 7 Jur. 1136.

The distinction is not very satisfactory, for "*date hereof*" might, without much violence, be intended to mean the date of "*the swearing hereof*;" and if the day stated in the *jurat* is taken to be the day of swearing, it is virtually the date thereof. The intention in that case was, to have used the word "*thereof*," referring to the *date* of the rule thereto annexed, and not to the date of the affidavit.

In the present case, and in affidavits of service according to the usual forms, the words "*instant*" or "*last*" can generally be applied only by reference to the *jurat* as indicating the *time* at which the affidavit was sworn, and therefore treating it as the date or period in relation to which the terms *instant* or *past* are used.

The time and place of swearing may be proved upon an indictment for perjury, though contradictory of the *jurat*; but it appears to me, that the *jurat* is to be *primâ facie* taken as true in all particulars, and that if the month mentioned in the body of the affidavit, and referred to as "*instant*" or "*last*," be untruly stated in connection with the actual time of swearing, that perjury might be assigned upon the allegation as untrue, if knowingly and wilfully false, without regard to the *jurat*; and though somewhat nice, there is room for distinguishing. An affidavit stating a fact to have occurred on the date of the date thereof, refers to something internal, apparent on the face of it, by which the time is shewn; and when sworn, and before the *jurat* is added, there is no such date as supposed; and unless the words "*date hereof*" could be construed as equivalent to "*the swearing hereof*," it would on the face of it be uncertain.

But when the period is referred to as such a month last or instant, the reference is external, and depends for application upon the month and day, *i. e.* the time when sworn. The affidavit speaks at and from the time of swearing, a fact that may be proved without regard to the contents or to the *jurat*. The *jurat*, however, importing the time when the affidavit was sworn, the words *past* or *instant* are ascertained by reference thereto, not as a *date*, but as being the day when the affidavit was made, and on and from which it speaks.

The fact is alleged at the time of swearing, and can be determined thereby, and before the *jurat* is added; the *jurat* being no further material than to certify when (as a fact) such affidavit was sworn.

The words *last* or *instant* do not refer to any supposed *date* thereof, but to periods spoken of in the swearing, and ascertained, not by any alleged date, but by the time of such swearing.

There is room for this distinction; and all the forms in the books of practice assume such references to months past or present to be sufficient. I am disposed, therefore, to uphold the form so long and generally in use on this head.

*Per Cur.*—Rule discharged without costs.



## QUEEN'S BENCH.

EASTER TERM, 11 VICTORIA.

Present,—THE HON. J. B. ROBINSON, C. J.,  
 THE HON. MR. JUSTICE MACAULAY,  
 THE HON. MR. JUSTICE McLEAN.

THE HON. MR. JUSTICE JONES sitting in the Practice Court.  
 THE HON. MR. JUSTICE HAGERMAN died the 15th of May, 1847.

## MILBURN V. MILBURN.

A. sends a waggon to B. to make the wood-work. B., having finished the wood-work, sends the waggon in A.'s name to a blacksmith, for the iron-work. B. gets the waggon back again from the blacksmith's. A. calls for the waggon. B. allows him to remove the box of the waggon from his shop into the highway; but on his returning to the shop to take out the running part of the waggon, B. refuses to let it go till he is paid his bill. A. holds in his hand a quantity of notes, and offers to pay B. his demand, if he would tell him what it was. B. would not name any sum, and insisted upon detaining the waggon.—*Held*, that B., by sending the waggon to the blacksmith's, had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon. *Held also*, that B. allowing A. to remove the box of the waggon into the highway was no waiver of his lien. *Held also*, that it was for the jury to determine whether B. had not had full opportunity of seeing that A. was tendering him a sum sufficient to meet his demand; that if the jury were satisfied that he had, then that the tender was a good one, notwithstanding B. had refused to name the specific amount of his bill.

This was an appeal from a judgment of the judge of the District Court of the Colborne District, ordering a nonsuit to be entered on leave reserved at the trial.

Action, trover for a waggon.

The defendant pleaded the general issue.

2ndly, That the plaintiff was not possessed.

The defence set up was right of lien, the defendant having made the waggon for the plaintiff, and refusing to deliver it up till he was paid; such defence being open to the defendant under the plea of "not possessed."

The facts of the case are fully stated in the judgment of the court.

*R. P. Crooks*, for the appeal, relied upon 1 Stra. 537; 1 Camp. 410; 5 Bing. 130.

*Cameron*, Sol. Gen., *contra*, cited 7 Dowl. 510; 1 C. & P. 288; 3 C. & P. 342.

ROBINSON, C. J., delivered the judgment of the court.

The judge at the trial considered the justice of the case to be clearly with the plaintiff, and so I think it was, under the facts proved. He

therefore granted the nonsuit with reluctance, thinking that the lien existed—that it was incumbent on the plaintiff to tender the price of the waggon before he could claim the delivery of it, and that the tender proved was not in all respects such a tender as the law allows to be sufficient.

The plaintiff on his part relied, 1st, upon the fact that the defendant, who was employed only to make the wood-work of the waggon, had foregone his claim of lien, by allowing the waggon to be sent in the plaintiff's name to the blacksmith who was to furnish the iron-work. This, he contended, constituted a delivery, and made the waggon the plaintiff's.

2ndly, He relied on the fact, that after the defendant had got back the waggon from the blacksmith, and completed it, and when the plaintiff called for it, he did not at first object to deliver it, but allowed the plaintiff to remove the box from his shop into the highway; and this, he maintained, constituted a delivery, and was a waiver of any lien the defendant might have.

When the plaintiff went into the shop to take out the running part of the waggon, the defendant for the first time objected, and insisted that it should not go out of his possession till he was paid his bill; but the plaintiff contends it was then too late.

On both these points I think the plaintiff must fail.

When the defendant got the waggon back from the blacksmith's, his right of lien revived. The allowing it to be taken to the smith's, and having ironwork put on it at the plaintiff's expense, and for which the plaintiff paid, had only the effect of making that specific waggon the property of the plaintiff, so that the defendant could no longer have parted with it to any other customer; but his right to detain it till he should be paid the charge for his own labour and materials, was not affected when it came again into his possession.

Then, as to the delivery of the waggon-box, we may reasonably suppose that the defendant acted at first on the assumption that the plaintiff came prepared to pay him, but resolved to be certain of that fact before he finally parted with it.

The judge was right, therefore, I think, in holding that the case turned upon the sufficiency of the tender; but he should have left it, in my opinion, to the jury, upon the evidence, to determine whether they were not satisfied that the plaintiff did offer as much money as would have paid any charge the defendant could have, and whether the defendant had not full opportunity to see that the plaintiff held in his hand a sufficient amount, although he did name the sum.

The evidence leans strongly to the conclusion that he exhibited much more than enough money to the defendant on the spot; and that the defendant could have no doubt he did so, and that he had only to name the sum he demanded, when it would immediately be paid to him.

The defendant took the unreasonable part of refusing to say what the amount of his demand was, and yet to withhold the waggon till the plaintiff should pay him an unknown sum. If he had said he had not yet made up his charge, but would do so without delay, he might reasonably have detained the waggon in the meantime; but that was not his conduct. According to the evidence, he would name no sum,

without assigning any reason for not stating it, but insisted on detaining the waggon. Mr. Starkie says, in his Evidence, "In a tender made to relieve goods from a lien, the same form and precision are not necessary, as when it is made in discharge of a debt." In such a case it has been held to be unnecessary to tender the precise sum.—3 Starkie, Ev. 1166.

When a vendee goes to obtain a delivery of goods sold to him, but not paid for, it is a principle of law, that his readiness to pay for the goods will be presumed from the mere act of his going to demand them, until the vendor puts him to the proof, and ascertains and can shew that he was really not prepared to pay.

The same principle I think should apply in the present case. He should infer that the plaintiff was ready, and had money with him to pay for the waggon when he went to demand it, unless the contrary is clear. But so far from the contrary being proved, the evidence was strong to shew that he was in fact ready; for he declared himself to be so, produced a quantity of bank-notes, offered to waive for the time any cross demand of his own, and to pay the price whatever it might be.

Though he did not name the sum which he held in his hand, it should I think be presumed that he had enough, especially since the defendant would not enable him to give better proof of it, by refusing to state the sum.

His detention of the waggon under pretence of his lien, taking all the circumstances in view, was a wrongful detention; and we think the nonsuit should be set aside, and a new trial had, with costs to abide the verdict.

*Per Cur.*—Judgment below reversed. New trial ordered, with costs to abide the verdict.

### HUNTLEY V. SMITH, SHERIFF.

A sheriff is liable to an action for the escape of a party attached for contempt of court, in not performing an award; and it is not necessary, in order to this action, that the party should be brought up on the return of the writ of attachment, and formally committed by the court.

To an action against the sheriff, for the escape of a party attached for non-performance of an award, he will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award. He cannot go behind the order authorising the attachment.

*Semble*, that the omission by the plaintiff to aver that the sheriff had not the party before the court, at the return of the writ of attachment, though not bad on general, would be bad on special demurrer.

Action on the case, against the sheriff of Simcoe District, for allowing a prisoner to escape, who had been arrested upon an attachment for non-performance of an award.

Defendant pleaded, 1st, that Bayley and the plaintiff did not respectively become bound each to the other by the said bonds of arbitration in the said declaration mentioned, in manner, &c.

2ndly, That the arbitrators did not, on or before the 13th of October, &c., make any award in writing, subscribed with their own proper hands,

of and concerning the said matters in difference between the said plaintiff and said Bailey, ready to be delivered, in manner, &c.

4thly, "That after the making of the said award, and before the time appointed for the payment of the money thereby awarded to the plaintiff, and before the last day of the term next after such award was made and published, to wit, on the 14th day of October then next, the said plaintiff and the said John Bayley mutually consented and agreed to waive, destroy, relinquish and abandon the said award, and all benefit respectively on either side upon or by virtue thereof, and to discharge and acquit each other from the performance of the same; and that the said award was thereupon, to wit, on the day and year last aforesaid, waived, destroyed and abandoned, and the performance thereof relinquished, by the said plaintiff and the said John Bayley respectively; and that no other award concerning the same matter has been made. And of this the defendant puts himself upon the country, &c."

Demurrer to 2nd and 3rd pleas, that they form no defence to the action.

Demurrer to 4th plea, "that the defendant attempts to avail himself of an objection to the writ of attachment in the declaration mentioned, and the arrest of the said John Bayley thereupon, which could only, if at all, be taken advantage of by the said John Bayley, and attempts by his said plea to go into matters which must be taken to have been settled before the issuing of the writ of attachment. That it is not shewn by the said plea how or in what manner the said award was waived, destroyed and abandoned, and the performance thereof relinquished by the said plaintiff, or that any act was done by either of the parties—that such waiver and abandonment could not be made by parol. That no consideration is alleged for the agreement by the plaintiff to waive, destroy and abandon the said award. That the said plea should have concluded *with a verification*; and that the said plea is in other respects informal, uncertain and insufficient."

*Thomas Ewart*, for the demurrer, relied upon 1 C. & M. 398; 8 E. 346, to shew that the 2nd, 3rd and 4th pleas of the defendant were not open to him as affording a defence to the action. The defendant could not go back to matters behind the attachment. Any defence to the submission and award was available to the party in the suit, when opposing the issuing of an order for the attachment; but the order being once made, the party himself—much more the sheriff—would be thenceforth precluded from questioning the legality of proceedings forming the foundation for the order.

*W. H. Blake, contra*, contended that the plaintiff had no right of action against the sheriff, for an escape of a party in custody under an attachment for contempt of court in not performing an award; at all events, no right of action could accrue until after the return of the writ, and the prisoner had been fully committed by the court.—2 B. & Ald. 571; *Watson on Awards*, 193; *Billings on Awards*, 247. That the same defence was open to the sheriff in this action as in an action for an escape upon a *ca. sa.*; and that as in the latter the sheriff could question the judgment, so in the former he might question the submission and award.—8 B. & C. 124;



7 M. & W. 473; 2 T. R. 126; 7 Ves. J. *ex parte* Ilchester; 5 B. & Ad., Goss v. Lord Nugent.

ROBINSON, C. J., delivered the judgment of the court.

The defendant did not apply himself, on the argument of the demurrer, to supporting the pleas demurred to, but relied upon objections to the declaration—or rather, indeed, to the action; for he contends that the plaintiff cannot sue for an escape under the facts stated, the attachment being in form a writ for the purpose of punishing the party as being guilty of an offence, and not a civil process from which the party can derive any direct benefit. And he contends further, that at all events the sheriff could not be liable to such an action, except where the defendant had been brought up on such a writ, and formally committed by the court for the contempt.

With respect to the first point, the case cited of *Brazier v. Jones* (8 B. & C. 124) is an answer to it; for that was an action for the escape of a person attached for contempt, in not performing an award; and though the plaintiff was nonsuited for defects in his evidence, no doubt is expressed that the action would lie.

The attachment is in the nature of a civil remedy, the very object, and sole object of which indeed is, to enforce the payment of the money awarded.

That the sheriff should be liable, when a private injury has been sustained from the escape, is but reasonable; and in *Higginson v. Sheiff* (*Comyn's Reports*, 155) the principle is stated in broad terms, which, with some exceptions, is undoubtedly correct, that when an officer may justify the detainer, he is answerable for the escape of a prisoner.

As to the other objection taken to the declaration, it would be inconsistent to hold the plaintiff to shew a formal commitment for the contempt, upon or after the return of the attachment, when the very grievance complained of is the escape of the party before such a commitment could be obtained.

The only question can be, whether, for the escape of the party before the return of the attachment, an action will lie.

It is said no instance can be found of such an action. That may arise from no escape under such circumstances having given rise to an action which was afterwards the subject of discussion in court. But I can imagine no reason why an action should not lie for such an escape, as well when it occurred before the return of the writ, as when it occurred afterwards.

The party entitled to the money under the award, is alike injured in both cases by the sheriff's failure in discharge of his duty, and must be as clearly entitled to compensation in the one case as in the other.

The case of *Brazier v. Jones* was much relied upon by the defendant, but there is nothing decided in it which creates difficulty here; for in this action, the judicial authority for the issuing of the process is expressly averred in the declaration. Everything is stated that could have been. The plaintiff could not of course set out a formal commitment for the contempt, because that had not yet taken place. The object of arresting the party was to procure that result, if any such formal commitment were necessary, in which object this plaintiff was frustrated by the party being suffered, as he complains, to escape.

The only doubt which, as it seems to me, the case admits of is, whether the plaintiff ought not to have averred expressly that the sheriff had not the party before the court at the return of the writ.

Bail might, it seems, be taken for his appearance to answer the contempt (4 D. & R. 393), though not by the sheriff as of course, but only by leave of the court or a judge, upon the defendant's application.

It was as much the duty of the sheriff to keep the party till the return of the writ, as upon a *ca. sa.*; for so far as the discharge of his duty alone was concerned, he could not take bail.

If it were analogous to the case of an arrest on mesne process, and if the objection were taken, on special demurrer, that it is not alleged that the party did not appear at the return of the writ, such an objection might be found entitled to prevail (2 B. & P. 561; Cro. Eliz. 289; 2 Chit. Plea. 552); but in my opinion, we cannot upon general demurrer hold that the declaration states no cause of action, when it alleges a voluntary escape, and that by reason of the escape the plaintiff has been delayed in the recovery of the money awarded to him, and is likely to lose the same.—8 T. R. 129; Cro. Eliz. 289.

And besides, an attachment for not paying money awarded, is not to be looked upon as a mesne process, though in its language it directs that the party is to be brought up at the return of the writ, to answer for the contempt. It is, in fact, in the nature of a civil execution. Interrogatories are in such a case never filed, but the party is detained in custody till he pays the money or performs the award. *Phelps v. Barrett* (4 Price, 23) is express upon that point. *Lewis v. Morland* (2 B. & Al. 56) contains language of the judges—at least of Mr. Justice Bayley—at variance with the principle of that decision; but Mr. Justice Abbott is more guarded in his reasoning; and the judgment given in the case does not go the length of warranting the opinion, that an action will not lie for an escape of a person attached for non-payment of money, when the party is not shewn to have been in custody at the return of the writ, or at any time afterwards, and when the plaintiff had been in consequence hindered or delayed in the recovery of his money. On the contrary, I infer from the decision in *Lewis v. Morland*, that in a case like the present, the judges who concurred in that judgment would have held the action maintainable.

The pleas are in my opinion clearly insufficient.

The 2nd plea denies the submission, and the 3rd plea denies the award; but these must be taken to have been established to the satisfaction of the court, as they formed the foundation of the order for the attachment; and though the sheriff might deny that such an order was made, he cannot admit the order, but deny the existence of the facts on which it was made.

He might as well, if the plaintiff had sued upon the award, and had obtained judgment and taken out a *ca. sa.*, have suffered the party to escape, and defended himself by denying the submission and award. He cannot, in my opinion, go behind the order which authorised the attachment.

So with respect to the defence set up by the 4th plea, independently of the principle affirmed in the case of *Braddick v. Thompson* (8 E. R. 346), that a collateral agreement by parol cannot be pleaded to

invalidate a claim arising upon a sealed submission ; that is a defence which, if the party had it, he waived, and it is not for the sheriff thus to make himself a party in the cause, and set up defences which the defendant either knew he could not substantiate or chose not to advance.

We are of opinion that the plaintiff is entitled to judgment on the demurrer.

*Per Cur.*—Judgment for the plaintiff on the demurrer.

### SMITH V. OATES.

A plea that promissory notes were obtained by fraud and covin, *and* without consideration, is bad for duplicity.

The plaintiff, suing as holder of a note payable to B. or bearer, avers that B., the payee of the note, transfers and delivers it to plaintiff. The defendant pleads, not traversing the fact that B. did assign the note to the plaintiff, but denying it, by relating the transaction in a wholly different manner, averring that the plaintiff took the note by delivery from other parties, having no connection or interest with B. *Held*, plea bad on demurrer, as being an argumentative denial that B. assigned the note to plaintiff.

The plaintiff declared in two counts, on two promissory notes for 62*l.* 10*s.* each, made on the same day by the defendant, payable to one Thomas Postans or bearer, the one in twelve and the other in twenty-four months from the date.

In each count it was averred, that the said Thomas Postans delivered, transferred and assigned the said note to the plaintiff.

The defendant pleaded in his 2nd plea, that the notes were procured from the defendant by one Samuel Andruss, by fraud, covin and misrepresentation, and without any value or consideration to the defendant for the same ; and that they were afterwards transferred by Samuel Andruss to the plaintiff, without consideration.

3rd plea, That the said notes were obtained from the defendant by the fraud, &c., of one Andruss, and *without value*, and were afterwards assigned by Andruss to one Margaret Andruss without consideration, who assigned them to the plaintiff with full knowledge of fraud, &c.

5th plea, That before the time when, &c., one Samuel Andruss was agent for one Lodor & Postans, as iron-founders ; that divers sums of money had respectively become due to the said Lodor & Postans ; and in consideration that *Andruss* would give the books, ledgers, &c., to defendant, to collect the debts, and receive the proceeds, defendant gave said notes to Andruss : that in consideration of such agreement, defendant made the said notes ; that Andruss did not deliver the books, &c., and defendant in consequence could not collect debts ; that said notes were afterwards assigned by Andruss to Margaret his wife, without value, with whom they remained till they became due, and were afterwards transferred to the plaintiff.

6th plea, That before the said time when, &c., until January, 1841, Andruss was agent for one Lodor, and also agent for Postans from January, 1841, till, &c. ; that divers sums of money had become due respectively to Lodor and Postans ; that afterwards, and while the debts were so due as aforesaid, it was agreed between Andruss, *acting*

as the agent of Postans, that the said Andruss should deliver the ledgers, &c., aforesaid, to wit, of Lodor & Postans, in order that the defendant might collect the debts due to them, in consideration that defendant made the said notes; that defendant received no consideration, and although a reasonable time had elapsed, Andruss had not delivered ledgers, &c.; that Postans, before any of the moneys were collected, forbade defendant to collect; that the consideration for the said notes had wholly failed, through the default of said Andruss; that the said notes were afterwards assigned to Margaret, wife of Andruss, without value, and by her to the plaintiff without consideration; and that plaintiff sued on behalf of said Andruss.

Demurrer to 2nd plea, that it was double, in stating that notes were obtained by fraud, and without value; that it was not shewn for what purpose the notes were made; that it did not shew affirmatively in what way there was no consideration; that it was too general, and amounted to the general issue; that it did not appear that Postans was connected with the fraud, &c., or that Andruss was his agent, and could bind him; that it traversed argumentatively, Postans being the holder of the said notes, and assigning them to the plaintiff.

Demurrer to 3rd plea, that it amounted to the general issue; that it was not shewn how the said notes were made; that it was argumentative.

Demurrer to 5th plea, that defendant did not shew how Lodor & Postans were connected in business; that it did not appear that the consideration for the said notes was for debts due partly to Lodor and partly to Postans, nor was there shewn any privity between them; also, for all that appeared, defendant might have, without the books, &c., collected sufficient to satisfy said notes; that it was an argumentative answer to the declaration, and should have concluded with a special traverse.

Demurrer to 6th plea, that it was inconsistent, because it alleged that there was no consideration for said notes, *except as aforesaid*; whereas the defendant had not alleged any consideration at all in the introductory part of his 6th plea. That it admitted that there was a consideration, and then denied it. That it alleged that certain debts were due to Lodor & Postans; that Andruss, as agent for Postans *only*, agreed to deliver the ledgers, &c., to defendant, in order that he might collect the debts due to the said Lodor & Postans. That Postans forbade defendant to collect debts due to Postans. That said plea said nothing as to the debts due to Lodor; so that the defendant might have collected sufficient to satisfy said notes. That it did not appear that Andruss assigned the notes to plaintiff as agent for Postans, but solely on his own responsibility. That it was an argumentative answer. That it was double, in alleging two defences—1st, that Andruss did not deliver said books, &c., which delivery was a condition precedent before notes could be valid, which would be a good defence; and 2ndly, that Postans had forbidden defendant to collect said debts. That it was illogical, in that it alleged that Postans had forbidden defendant to collect the debts, and then drew the inference, that the consideration failed through the default of Andruss *only*.

R. P. Crooks, for the demurrer, stated the several grounds of



demurrer as above, and referred to *West v. Bown*, 3 U. C. R. 291 ; 4 Bing. N. C. 655.

*W. H. Blake* and *Thomas Ewart*, contra, cited, in support of the pleas demurred to, *Bank of U. C. v. Humphries et al.*, 3 U. C. R. 463 ; 1 Q. B. R. 498 ; 13 M. & W. 33, 651 ; 3 Camp. 375 ; 2 A. & E. 483 ; 5 M. & W. 7 ; 5 Tyr. 377 ; 1 C. M. & R. 772 ; 3 Dowl. 395.

ROBINSON, C. J., delivered the judgment of the court.

Independently of the objection to this plea, on account of its having neither confessed and avoided, nor traversed the fact alleged in the declaration, of Postans' having transferred and delivered the notes to the plaintiff, the exception is taken, that it is double, in relying upon fraud and covin in obtaining the notes, which of itself avoids them, and in pleading besides that the notes were obtained without consideration.

It is in that respect undistinguishable from *West v. Bown*, decided in this court (3 U. C. R., 291), upon the authority of English cases which were referred to.

If the plea had stated the two objections less distinctly, the ground of duplicity would have been less apparent.

For instance, it might have said that the notes had, through fraud, been obtained without consideration ; and the defendant would have seemed to be relying upon the want of consideration as his single, substantive defence. But here, after alleging that the notes were obtained by fraud, which alone is a sufficient defence, without any regard to want of consideration, he adds, "and without any value or consideration therefore," which alone would be equally a defence, without any imputation of fraud.

There are cases to be found in the books, in which the pleas of this nature appear to have been so framed as to be equally open with the present to the objection of duplicity, and not being specially demurred to, they have passed without remark, so far as regards their being double ; but I can find no case where such a plea has been held good, when excepted to for duplicity as this is, and the fault clearly pointed out ; and when the objection has not been taken, the court in England have remarked upon the plea, when so framed, as being artfully contrived to allow of a double defence, which in other words would shew it to be bad for duplicity, if specially demurred to on that ground, as was the case in *Stephens v. Underwood* (4 Bing. N. C. 655), which is the same in principle as that before us.

The 3rd plea is liable to the same exception of duplicity as the 2nd, and must be held bad on the same ground.

They are both also liable to an objection, which need not be considered as it applies to them, but which it is necessary to determine in the 5th and last pleas.

In these pleas there is no allegation of fraud, and the same question of duplicity therefore does not arise. But in our opinion, both of those last-mentioned pleas are bad, on account of the objection taken to them, that they neither confess and avoid, nor traverse the averment in the declaration, that Postans, the payee of these notes, transferred and delivered them to the plaintiff.

The declaration sets up a claim in the plaintiff to these notes, by immediate assignment from the payee, who it is evident from the plea,

was no fictitious person, but intended to be the real payee of the notes for value given by him.

The defendant does not traverse the fact that Postans did assign these notes to the plaintiff, but denies it argumentatively, by relating the transaction in a wholly different manner, averring that the plaintiff took the notes by delivery from other parties, having no connection or interest with Postans.

The case of the Bank of Montreal v. Humphries, decided in this court (3 U. C. R. 463), was cited in support of these pleas; but it will not be found, upon examination, to have that effect. The cases are very dissimilar.

In order to make the matters alleged in these pleas a good defence, it was necessary to shew that the plaintiff did not stand in the situation of a *bonâ fide* holder of the notes, who had given value for them to the rightful owner, and without notice of the want of consideration between the original parties. The statements to that effect in the 5th plea are, that one Samuel Andruss, who was not payee, and who, according to the statements in the plea, could have no beneficial interest in the notes, assigned them to one Margaret Andruss, who assigned them to the plaintiff after they had become due, which would render any question about notice of the original want of consideration immaterial.

The statements in the other plea are to the same effect, as regards the notes being assigned to Margaret Andruss, by a person who was not the payee, and who, according to the facts stated, could have no legal interest in them, and no right to transfer them; and this plea contains the further averment, that the plaintiff has no interest in the notes whatever, and is not the holder thereof on his own account, but sues for the benefit of Margaret Andruss. Now, both of these accounts of the transaction are utterly inconsistent with the plaintiff's declaration, in which he sues upon the notes as the holder thereof, by direct assignment and delivery from the payee, Mr. Postans, made on the day that the notes were endorsed; so that the pleas neither confess and avoid the plaintiff's title as holder, nor traverse it.

There are some exceptions taken to the pleas which are not material to be considered, because, admitting them to be well founded, they are not exceptions to the plea, but to the legality of the transaction which forms the subject-matter of the inducement.

It is true, no doubt, that it is upon the face of it a very absurd statement, that Andruss, without any special authority from Lodor or Postans, should pretend to sell to a stranger all the debts due to them from their customers; and although their interests appear to have been quite separate and distinct, yet Andruss, as agent for Postans, should sell to the defendant, not only the debts due to Postans, but also those due to Lodor; and that the note should be made to Postans in payment of the whole. It is no less absurd, that Andruss, without any authority from Postans, should take upon himself to assign the note to a third party. But these irregularities in the transaction form no exception to the plea; for the defendant is not interested in supporting the legality of the note. He is not claiming under the transaction, but is shewing that it afforded ultimately no good consideration for the note; and such exceptions as these would tend to strengthen his defence,

rather than otherwise. But for the other reason, that the defendant neither confesses and avoids the plaintiff's title, nor traverses it, we consider these pleas bad, and give judgment for the plaintiff on the demurrer.

*Per Cur.*—Judgment for the plaintiff on the demurrer.

---

#### KENNEDY ET AL. V. BRODIE.

A debtor, out on bail to the limits, comes to the sheriff's office, and tells the clerk there that he wishes to surrender himself. The clerk tells him to remain in the office till he finds the sheriff or his deputy. He goes out, and leaves the debtor in the office; but before he finds the sheriff, and returns to the office, the debtor absconds. *Held*, in an action brought by assignees of sheriff against the bail, that this being a mere pretended and fraudulent render, it could not fix the sheriff.

This was an action of debt on bond for limits, by assignees of sheriff.

Plea, that the debtor had rendered himself to custody denied.

The jury found against the defendant, on that and other issues; and gave a verdict for the debt, 576*l.* 11*s.* 4*d.*

A new trial was moved, on the law and for misdirection.

ROBINSON, C. J., delivered the judgment of the court.

We can grant no rule against this verdict; it was quite right upon the evidence.

There was no render proved. The party came himself to the sheriff's office, and told the clerk there that he wished to surrender himself, in order that he might obtain the weekly allowance. The clerk told him to remain till the sheriff or deputy came, and went out, leaving him there; but before the clerk found the sheriff, and returned to the office, the party had absconded.

It was a mere pretended render, not formal, or even *bonâ fide*, but fraudulent, and a mere contrivance to fix the sheriff with the debt.

*Per Cur.*—Rule refused.

---

### QUEEN'S BENCH.

JUDGMENTS DELIVERED ON THE SECOND TUESDAY AFTER  
EASTER TERM, 6TH JULY, A.D. 1847.

---

Present,—THE HON. J. B. ROBINSON, C. J.,  
THE HON. MR. JUSTICE MACAULAY,  
THE HON. MR. JUSTICE MCLEAN.

THE HON. MR. JUSTICE JONES, having sat in the Practice Court during Easter Term, gave no judgments.

THE HON. MR. JUSTICE DRAPER, appointed to succeed the late Hon. Mr. Justice Hagerman, absent in England.

---

CAMERON, ADMINISTRATOR OF McDONALD, SHERIFF, MIDLAND  
DISTRICT, v. FORSYTH AND MUTTLEBURY.

Where a counsel, upon stating to the jury the facts he himself could prove, is reminded by the judge that he cannot act both as an advocate and a witness,

and then immediately sits down, ceases to act as counsel, and gives evidence in the cause, the court will not enforce their recent rule so rigidly as to set aside the verdict.

Assumpsit on common counts.

Judgment by default.

Damages assessed at 43*l.* 4*s.* 9*d.*

*D. B. Read* moved to set aside verdict, for reception of improper evidence, Douglas Fraser, the plaintiff's counsel, having been sworn as a witness at Nisi Prius for the plaintiff, or to set aside all proceedings against the defendant Muttelbury, he having been served with no process or papers in the cause, or to set aside interlocutory judgment, and all proceedings subsequent against both defendants, for the cause last mentioned, and on affidavits filed.

The facts fully appear in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

As to the first ground, the judge reports that Mr. Fraser was proceeding to open his case to the jury, and mentioned that he would prove by his own testimony certain facts in the case, upon which the judge reminded him, that by the late decision, he could not be at the same time counsel and witness. He followed the suggestion of the judge, and ceased to act as counsel, discontinuing his remarks to the jury, and gave evidence in the cause, not resuming the part of counsel.

As to the second ground, this action is to recover for services rendered by the intestate, as sheriff serving process in civil suits, at the request of the defendants, who were and still are partners in the practice of attorneys.

The defendant Muttelbury swears "that he never has at any time "been served with process, bill, declaration, notice or paper whatsoever "in the cause," not denying that he had knowledge of the cause proceeding, or that he had agreed to accept process, or that papers had been served at their joint office.

Mr. Forsyth, the other defendant, swears that he has a good defence on the merits; but he made defence by counsel at the trial, and does not shew why he did not move earlier, and at all events after notice of assessment served; and he explains that his merits consist in a set-off, on a note given by the intestate to himself for money lent, and for which he has an action pending; that the plaintiff in this action pleaded "*plene administravit*," and that in consequence of that plea, and not hearing from the plaintiff, he was under the impression that the bill filed in this cause had been abandoned, and did not plead thereto.

As to Mr. Fraser, while counsel, having given evidence, it would be enforcing the rule in too rigid a spirit, while notice of it may be supposed not to have reached all the profession, to set aside the assessment under the circumstances.

The counsel was checked, and left the case afterwards to take its chance. He had no opportunity, perhaps, to instruct other counsel.

As to the defendant not being served with process, the two defendants are partners and attorneys, in whom *laches* and lying-by are less excusable than in others. Interlocutory judgment was signed in August against both the defendants, and they neither of them moved till June in the next year. Muttelbury does not assert that he had not knowledge of the action proceeding; and it is reasonable to assume that he must have known it.



As to Mr. Forsyth, his note would be no set-off in this action at any rate. Under the circumstances, he may apply with success to the court, under another shape, to stay proceedings in this cause till he is satisfied in his action on the note. He must consider whether he will apply.

*Per Cur.*—Rule refused.

### SMITH V. DAVIDSON.

A. releases B. from gaol, by undertaking to pay to C. the debt B. owed him—C. sues A. upon this undertaking, and recovers. B. requests A. to defend the suit in order to gain time. *Held*, that A. could recover from B. the costs of this suit, on the common count for money paid to his use.

*Assumpsit* on the common counts.

The defendant paid 2*l.* into court, and pleaded *non assumpsit* to the residue of the demand.

Verdict for plaintiff, 10*l.* 8*s.* 6*d.*

The question at the trial was, whether Smith, who had released the defendant from gaol, by undertaking to pay to his creditor, one Perkins, the debt which he owed him, could recover against the defendant upon the count for money paid to his use, the costs of a suit which Perkins had brought against him, upon his note given on the defendant's account, and which the plaintiff had defended at the request of this defendant Davidson, in order to gain time.

It was proved, that the attorney who defended the suit in the name of the plaintiff, did so at the defendant's request.

It was objected, that if the plaintiff could compel the defendant to pay the costs which he had been put to in defending that action, it could only be on a special count, framed to meet the case.

*Burnham*, of Whitby, moved for a new trial, the verdict being contrary to law. He contended, that if defendant was liable to pay for these costs, they could only be recovered on a special count. 6 C. & P. 673; 8 T. R. 610.

*Ball*, of Whitby, shewed cause. He relied upon 8 T. R. 308; 4 T. R. 512; 3 Camp. 168; 5 Taunt. 615; 4 Taunt. 189; *Miller v. Munroe*, Mich. Term, 5 Vic.

ROBINSON, C. J., delivered the judgment of the court.

It would be doing little benefit to either party, to disturb this verdict upon the mere ground whether the 10*l.* 8*s.* 6*d.* could be regularly recovered otherwise than by a more special, and therefore a more expensive form of declaring; but the case seems to have been decided at the trial as it ought to have been.

It appears to me to come within the principle of Lord Kenyon's ruling, in *Howes v. Martin*, 1 Esp. C. 162; for it was proved that the defendant desired the action to be defended, in order to gain time for repaying the money which the plaintiff had advanced for him, and which he was bound in justice to provide, when Perkins called for it upon the note which the plaintiff had given on his behalf, and through which he had obtained his discharge from custody.

The evidence was sufficient, we think, to warrant the jury in holding

that the costs were incurred at this defendant's request; and if so, then, when this plaintiff was obliged to pay them, he had a claim against him, for money paid to his use.

*Per Cur.*—Rule discharged.

# DUNCOMBE V. FONGER ET AL.

The plaintiff replies *de injuriâ* to the defendants' plea, concluding to the country with an &c. The plaintiff makes up the Nisi Prius record, adding the similitur, &c. Ten days after the assizes have commenced, and a month after the replication had been served, the defendant demurs to the replication. The plaintiff proceeds with the trial, and has a verdict. The defendant moves to set it aside for irregularity, there being no similitur on the files of the court, and the plaintiff paying no attention to the demurrer. *Held*, that under our rule of court, 19 Easter Term, 5 Vic., there was no necessity to file a similitur. *Held also*, that under the 36th rule, Easter Term, 5 Vic., if the defendant wished to demur to the replication, he might do so, by serving, *within the proper time*, a copy of the demurrer upon the plaintiff.

Trespass to goods.

The defendant pleaded "not guilty."

2nd, Goods not the plaintiff's.

3rd, Giving colour.

The plaintiff joined issue on the two first pleas, and replied *de injuriâ* to the 3rd, concluding to the country with an "&c.," and then made up the Nisi Prius record, adding the similitur.

The record was passed on the 28th day of April; on the 8th of May, ten days after the assizes commenced, the defendants demurred to the replication.

The plaintiff proceeded notwithstanding the demurrer.

No defence was made at the trial, and he obtained a verdict for 72*l*.

The defendants gave no notice before the trial of their intention to object to any irregularity.

*D. B. Read*, for the defendant, moved to set aside the verdict for irregularity, there being no issue joined on the 3rd plea, *i. e.*, no similitur on the files of the court.

2ndly, Because a demurrer had been filed to the replication *de injuria* before trial, and no notice taken of it.

3rdly, Because there was no demand of rejoinder to the plaintiff's replication to the 3rd plea, and no similitur filed to the replication:—or to set aside the verdict, and obtain a new trial on an affidavit of merits.

In support of his motion, he cited 2 D. & L. 534; 1 D. N. S. 545; 1 Cowp. 407; 6 Dowl. 98; 1 Str. 641.

ROBINSON, C. J., delivered the judgment of the court.

As to the first ground of objection, the 19th rule of Easter Term, 5 Vic., expressly allowed the plaintiff in this cause to proceed as if the case were at issue, when he had replied *de injuriâ* to the defendants' plea, concluding to the country.

There was no need of a similitur to be filed in the office; but then no doubt the defendants could have demurred to the replication, as they

might have good ground for doing if the plea was one to which the general answer of *de injuria* could not be given.

They would then be in the same situation that a party might be in under the 36th rule of Easter Term, 5 Vic., when his opponent concludes to the country, after a special traverse, following an inducement of affirmative matter, to which he may wish to plead over.

In England, he would have to serve notice, in such a case, of his having filed a demurrer; otherwise, his opponent might remain under the impression that the pleadings were closed. Here, he need serve no notice; because our practice compels him to serve a copy of the demurrer itself.

Then, as the plaintiff in this case concluded to the country, he had not to demand a rejoinder, but could go on as if the cause were at issue, though no similiter had been filed, unless the defendants served him with a copy of a demurrer, which no doubt they were at liberty to do (1 Chit. Plea. 625); but then, I think, we should certainly hold, that the defendants were bound to demur within the time that they would have had to return the issue-book with the similiter struck out, if we had not abolished the English practice of making up and delivering the issue.

They did not do what would have been equivalent to striking out the similiter within that time; and they could not retain a right to demur at any time, so long as no rejoinder was demanded, when none was required.

The plaintiff then proceeded in the ordinary course, when he served his notice of trial. The similiter can be added at any time. There was here, besides, an "&c." on the record, which has been held to supply the place of the similiter.

Nothing is heard of the defendant till ten days after the assizes commenced, and more than three weeks after they must have received their notice of trial, when they file and deliver a demurrer, and now come in in banc, and move to set aside the verdict for irregularity, giving no notice before of any irregularity intended to be relied on.

I am of opinion, that under these facts, we cannot grant a rule for setting aside the verdict for irregularity; and since the defendants, instead of going to trial on the merits, have made this attempt to embarrass the plaintiff's proceedings, and have lain by on an irregularity which they cannot shew, we ought not to open the case when the verdict is not large, and seems just upon the evidence given.

If the conduct of the defendants could have been placed in a different light, by evidence which they had it in their power to bring, they should not have lost the advantage of producing that evidence, by relying on technical objections, which in most cases it is safer and better to waive.

The defendants' attorney could not have imagined that he was acting right, in receiving the notice of trial, and neither returning it nor giving any intimation that he did not acquiesce in the conclusion to which the pleadings had been brought, but allowing the party to go to all the expense of bringing his witnesses, and keeping them ten days at the assizes, and then filing a demurrer.

*Per Cur.*—Rule refused.

## MURPHY V. FRASER.

Where a defendant denied his endorsement of a note, and a witness, who swore, on his examination in chief, to his having actually seen the defendant sign the note, but upon his cross-examination could not swear to the identity of the paper endorsed, and the plaintiff, expecting to prove the actual endorsement by this witness, was not prepared to prove the defendant's hand-writing, and had a verdict against him, the court granted a new trial, on payment of costs.

Assumpsit against the defendant as second endorser of a promissory-note, made by one Probett to G. Scott or order, for 100*l*.

The defendant pleaded, that he did not endorse the note.

At the trial, the defence turned upon that issue; and the jury found in favour of the defendant.

The plaintiff moved for a new trial on the law and evidence, and for misdirection, and on grounds disclosed in affidavits filed.

ROBINSON, C. J., delivered the judgment of the court.

The affidavits are intended to support an allegation of the plaintiff being surprised by the defence at the trial, but they do not shew anything of the kind. The defence pleaded made the plaintiff distinctly aware of the necessity of proving the endorsement.

Still, the evidence given at the trial to prove the signature was by no means perfectly satisfactory; and we think the ends of justice require the verdict to be reviewed; but we cannot grant a new trial on more favourable terms than on paying costs.

The amount is considerable—100*l*. As the plaintiff had a witness who swore that he actually saw the defendant sign this note, he may have relied on that being sufficient. But besides that that witness was young, and not accustomed to such transactions, he could not, when pressed on cross-examination, satisfy the jury of the identity of the paper: he had not attested it at the time.

The case then turned, and perhaps unexpectedly to the plaintiff, upon the evidence of handwriting; and it was not so fully investigated in that point of view as it may be on another trial. We therefore allow another opportunity of taking the opinion of a jury, when both parties may be fully prepared.

*Per Cur.*—Rule absolute for a new trial, on payment of costs.

## LOW ET AL. V. OTTAWA DISTRICT COUNCIL.

The 43rd clause of the District Council Act, 4 & 5 Vic. ch. 10, does not subject a District Council to be sued *upon an implied assumpsit*, by reason of any transaction that may have occurred between the plaintiff and the justices in quarter sessions, or the treasurer of the district, before the existence of the council.

Special case.

The facts, so far as they bear upon the point decided, are sufficiently stated in the judgment of the court.

*P. M. Vankoughnet*, for the plaintiff.

*Cameron*, Sol. Gen., for the defendant.

ROBINSON, C. J., delivered the judgment of the court.

The first question is, can this action be maintained, brought as I infer it to be (for the pleadings are not before us) wholly



on the common counts, against the District Council established by 4 & 5 Vic. ch. 10, not for any debt or demand contracted for or due by them, by reason of anything happening or done in their time, but on a supposed implied assumpsit arising out of transactions anterior to the existence of any district council? I see nothing stated to have been done by the District Council, which could support this action as on an undertaking by themselves—nothing but propositions and reports, and ineffectual attempts to settle the matter, not leading to any unqualified or direct admission of a claim upon the council. Then, looking at the question as upon a liability supposed to lie upon the district, by reason of what was done before the District Council existed, the District Council is not identical with the former Court of Quarter Sessions; and it could not follow as a matter of course, that whenever an individual, by reason of something that had occurred between himself and the justices in sessions before these councils were established, had a claim, either equitable or legal (if there could be any legal claim in the strict sense of the term), against the quarter sessions, he would therefore have a right of action upon such claim against the District Council, merely because the District Council Act, in its 1st clause, makes them liable as a corporation to be sued.

There clearly could have been no recourse against the Council, upon any such cause of action as I have stated, if it were not for the special provision made by the 43rd clause; and that provision, in our opinion, is confined to express contracts, made under such circumstances, that there would have been a legal recourse against the district, through the justices or the treasurer, if this statute had not created the new body, to stand in their place in such matters. These were transactions of that kind, such as contracts for gaols and court-houses, and perhaps others, into which the justices, or a committee of them, had power to enter, and thereby to bind the district under enactments of particular statutes. I have no idea that the legislature intended by that 43rd clause to subject the District Council, in their corporate capacity, to actions of this kind upon implied assumpsit, whenever an individual, who had at any time paid taxes, or bought lands sold for taxes, or done any other act which brought him in contact with the justices in sessions or the treasurer, may imagine that he has a pecuniary claim resulting from such transaction, by mere operation of law, and not under any express contract. For any such claim he could not have sued the justices in sessions, and cannot, in my opinion, upon such a claim, sue the District Council under the 43rd clause of the act.

It is quite impossible, in our opinion (without going into any of the other questions raised), to sustain this action for money had and received for the use of the District Council, for the purpose of recovering under it monies which the District Council never had or received, but which were paid into the district treasury ten years before the District Council Act was passed, and must, as we may suppose, have been long ago expended under the direction of the justices or the acts of the legislature, towards supporting the public expenses of the district.

The case of *McKee v. the Huron District Council*, decided in this court (1 U. C. R. 368), was referred to in the argument. I continue of the opinion which I then expressed.

*Per Cur.—Postea* to defendant.

## KENNEY V. ARMSTRONG.

A. retains B., an attorney living in Kingston, to defend him in a suit to be tried at the Perth assizes. Before the trial, A. comes to Kingston to advise with B. B. tells A., that having no other cases in Perth, he cannot go there in this one suit; but that C., who is a barrister residing in Perth, would attend to it, and that B. had better see him on the subject. A. *makes no objections*, but returns to Perth, and instructs C. in his defence. C. conducts the suit at the trial. A nominal verdict is given against A. No complaint is made that C. mismanaged the case in any way. *Held*, that under these circumstances, B. is not liable to an action for negligence, at the suit of A., in not himself making up a brief, and delivering it to C.

MACAULAY, J., *dissentiente*.

The plaintiff sued the defendant, an attorney of this court, for negligence in conducting a suit brought by one Jamieson against the plaintiff.

The declaration contained several counts; but the only one on which he rested his case at the trial charged, that the defendant being retained by him as his attorney, it became his duty, under the retainer, to employ counsel to conduct the defence at the trial, or to conduct the defence himself (which, according to our course, he could have done as a barrister); and the complaint was, that although the action was carried down to trial at Perth, on *20th September*, 1841, of which the defendant had due notice, yet he did not employ counsel to conduct the defence at the assizes, nor did he conduct the defence himself, but wholly neglected to do so, whereby the plaintiff was put to great trouble, inconvenience and expense.

The defendant pleaded the general issue.

The evidence at the trial was, that before the assizes, the plaintiff's brother went to the defendant, who resided at Kingston, and requested him to attend at Perth to manage the defence; that the defendant said he could not, and recommended him to employ Mr. Radenhurst, a barrister at Perth, which the defendant did, paying him his fee.

The defendant sent a plea, which it was said, but not legally proved, came too late; and that the plaintiff's attorney waived the interlocutory judgment, which had been signed, and received it on being paid the costs, 12s. 6d.

The suit was defended, and a verdict given against this plaintiff for 5s.

The plaintiff, not bringing any evidence to shew that interlocutory judgment had been signed, rested his case solely on the position, that the defendant was bound to retain and instruct counsel, and deliver him a brief.

The learned judge considered that to be clearly the defendant's duty, under his retainer; and that if the plaintiff sustained any injury, in consequence of its not having been done, he would be entitled to recover. But he remarked, that counsel was in fact employed and instructed by this plaintiff himself, who seems to have rendered all the service at the trial that could have been rendered, since the verdict given against the now plaintiff was only 5s., in a case in which a trespass appeared to have been committed by him, and on which he could not have been saved from nominal damages at least.

The jury gave a verdict for the plaintiff in this case, and 5*l.* damages.

*J. W. Gwynne* moved for a new trial, on the ground that the verdict was against the law and evidence, and the judge's charge. He contended that the facts disclosed no ground of action : no special damage had been alleged and proved.—4 B. & Ad. 424 ; 6 Bing. 460 ; 7 Bing. 413.

*H. Eccles* shewed cause, contending that there was sufficient evidence to warrant the jury in finding negligence ; and if any evidence was given upon this point, it was a question for the jury to decide, and the verdict could not be disturbed.—5 C. & P. 234 ; 2 B. & Ald. 402 ; 7 Moore, 237 ; 6 Jurist, 133 ; 7 Bing. 468.

ROBINSON, C. J.—It is plain from the learned judge's charge, that he saw no proof of injurious neglect, and considered that the plaintiff had made out no case ; for it surely is not to recover nominal or imaginary damages that actions on the case should be brought.

On carefully considering all that was proved, I am unable to see any fair ground on which the plaintiff was allowed to recover.

It is more than five years since the transaction took place. If the plaintiff felt that the defendant's not making up and delivering a brief to the counsel who did manage the case, was, under the circumstances known to them both, a culpable neglect, and one which had occasioned injury to him, it is strange that he did not seek his remedy till this late day.

The evidence does not shew under what circumstances the plaintiff retained the defendant ; for all we know, they may have been living at the time in Kingston, and before the assizes came on at Perth, the plaintiff would naturally go to the defendant, and enquire about the means that were to be taken for defending his cause.

If he took the trouble to do so, and to go in person to Perth, to be present at the trial, he did nothing more than clients generally do, and nothing that gives him a *prima facie* right to sue the defendant.

Then, when the defendant told him he could not go to Perth himself, and recommended him to employ a barrister residing there, he gave him reasonable advice, and such as the most attentive attorney might have done and has no doubt done in hundreds of such cases ; for if the attorney had no other business to take him from Kingston to Perth, it would be no particular favour to the client that he should take that special journey at his expense, when counsel on the spot could do all that he could.

And before the jury concluded that he was guilty of negligence, in not going himself, and that he did wrong to the plaintiff, in recommending him to employ Mr. Radenhurst, they should, I think, have seen some reason for believing that the plaintiff had at the time objected to being referred to another counsel ; that he had urged on the defendant to act himself for him, at any inconvenience or expense ; and that the defendant's recommendation was adopted unwillingly, and was not acquiesced in at the time. Because, if the plaintiff did not at the time object, but, without remonstrating, adopted the advice to go and employ a counsel living in Perth, he ought not to be allowed years afterwards to complain of it as an injury. He should have given some intimation that he insisted on more being done than the defendant was doing.



I can only say, that in my own experience I have known clients very often referred by their attorney to counsel, whom he thought abler or better situated for managing his case, without any idea in the attorney that he was neglecting his client's interest, or any idea in the client that he had anything to complain of.

Then the grievance, so far as I can comprehend from all that was proved, amounts to this, that in this cause, tried nearly six years ago, a brief was not made out by the defendant, and sent to the counsel at Perth.

It would be startling to the profession, I think, to announce it as a principle, that whenever an attorney had retained counsel, and not given him a formal brief, but had instructed him verbally or through his client, however intelligent the latter might be, he was liable to an action, whatever had been the event of the suit, and whatever had been the consequence of the want of the brief.

If a brief had been made and delivered, it must of course have been charged against the plaintiff, and paid for, whether it could have been of service to him or not.

Whether the plaintiff had been made to pay any bill of costs to the defendant as his attorney, is not shewn.

If, in the original action, the defendant had recovered a verdict in his favour, there surely then could not be ground for contending that he had sustained injury for want of a brief being sent to Mr. Radenhurst.

Then the actual event was, that he had a nominal verdict only rendered against him. That any exertion that the defendant could have made, could possibly have prevented that, is not shewn; and unless it could, the injury is wholly imaginary.

I do not see why the defendant may not have said very reasonably to the plaintiff, "I cannot go to Perth solely to manage this cause; and if I could, it would only be putting you to useless expense in a hopeless case. Your story is a plain one. Go and tell Mr. Radenhurst just what you have told me, and he will say what he can to the jury, to induce them to give trifling damages, which is all I, or any one, could do for you."

I think there should be a new trial, with costs to abide the event.

MACAULAY, J.—In *Godfrey v. Dalton* (7 Bing. 468), it is said by Lord Chief Justice Tindal, that the cases establish, that for want of care in the preparation of the cause for trial, or of attendance thereon with his witnesses, an attorney is liable, &c.

They also shew, that where there is evidence of negligence, it is for the jury; and here they have found for the plaintiff, with small damages.

Upon the evidence, I think it was correctly left to the jury, and that the rule to set aside the verdict should be discharged.

Had the verdict been the other way, I should not have disturbed it; but upon this evidence, it seems to me impossible to say the action is not sustained.

The plaintiff had engaged the professional aid of the defendant; and to say nothing of any *laches* in suffering a judgment by default to be signed, it certainly was the business of the attorney to enter proper pleas adapted to the defence, and when notice of trial was received, to prepare therefor.



It was his duty to attend personally, and if prevented, to make other arrangements to ensure due attention to his client's case.

Here he did nothing ; but upon being requested to attend, he said he could not, and desired the plaintiff's brother to employ counsel.

Now, although he was not bound to attend as a counsel, yet being also attorney, he ought to have attended, or have furnished a brief, &c., to other counsel.

It cannot be expected, in an action of *quare clausum fregit*, an ignorant client can go down to the assizes, select, retain and instruct counsel, equal to his attorney ; and although it may be, in the present instance, that no diligence on the part of the defendant could have averted the result of the action against the plaintiff, still it might have been otherwise.

The evidence does not enable us to form a satisfactory opinion of the real merits of the plaintiff's defence in the former action, so as to judge whether the defendant might or might not have rendered him more effectual services than were rendered.

But judging from the evidence as it appears on the notes of the learned judge who tried the cause, I certainly must say that there was evidence to go to the jury, and sufficient to warrant a verdict against the defendant.

McLEAN, J., concurred in opinion with the Chief Justice.

*Per Cur.*—Rule absolute for a new trial, costs to abide the event.

MACAULAY, J., *dissentiente*.

---

MOODIE, SHERIFF, V. BRADSHAW ET AL.

The plaintiff, sheriff, &c., sues defendant for a breach of the condition of a bond, in not re-delivering to him certain goods seized in execution, on a certain day, at a certain inn. The defendant pleads that he offered them to the plaintiff, at the inn, on the day named. The evidence did not prove the defendant's plea. The jury were told by the learned judge, that the plea not being proved, the plaintiff ought to have a verdict for 6*l.*, the sum remaining unpaid upon the execution. They found, however, for the defendant. *Held, per Cur.*, that notwithstanding the smallness of the verdict, as the defendants' plea had not been proved, the plaintiff was entitled to the verdict, and that there must be a new trial, without costs.

This was an action on a bond given to the plaintiff, as sheriff, to secure the re-delivery to him of certain goods, which he had seized on a *fi. fa.* against one Larkins.

The amount claimed was about 18*l.*

The condition of the bond was, that the goods should be delivered to the sheriff on the 26th day of December, 1846, at Vandervorst's Inn, in Belleville, or at any other time when he should demand them.

The defendants pleaded that they had offered the goods there to the sheriff, on that day, and that he had refused to receive them.

The evidence at the trial was, that the deputy-sheriff had gone to the inn at 2 o'clock on that day, when he had appointed to sell the goods, expecting there to receive them ; but they were not there.

Afterwards, on the same day, when he was engaged in other business, he met one of these defendants in the town, and was told by him that he

could have the horses and harness at Vandervorst's Inn, or that they were ready there; but the officer said that they should have been there when he wanted them; that he had been obliged to postpone the sale to another day, and would not then receive them.

It was not shown that the goods had in fact been taken to Vandervorst's at any time, and the defendants did certainly not prove their plea, that they had offered them to the sheriff there, on the 26th of December; and they had not pleaded that the sheriff had discharged them from delivering them on the day named.

The jury were consequently told, that though the deputy-sheriff had not acted very reasonably, in refusing to receive the goods on the 26th of December, since the obligors had the whole of that day to deliver them, yet that the defendants had not proved the plea, and that the sheriff was therefore in strictness entitled to recover, especially as the defendants could not be finally discharged by shewing their offer to deliver the goods on that day, unless that were most clearly made out; because it was part of the condition, that they should deliver the goods on any other day, when they should be required to do so; and the defendants had acknowledged since the 26th December, that the property had got into other hands, and that it was no longer in their power to produce it.

On the other hand, it was contended that payments had been made in money, on account of the execution the goods were to satisfy, leaving but a small balance of 6*l.* or 7*l.* due.

Upon that point the evidence was not clear; and as it was certain that at least the last-mentioned sum was due, for which the sheriff was accountable to the plaintiff in the *fi. fa.*, the jury were directed that a verdict should be given for the plaintiff, for such amount as remained undischarged upon the *fi. fa.*, the goods seized being of more than sufficient value to cover it.

The jury found in favour of the defendants.

*Campbell*, of Kingston, moved for a new trial, on the ground that the verdict was contrary to law and evidence, and the judge's charge.

*Wallbridge*, of Belleville, shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

It appeared clear to me at the trial, that the plaintiff was entitled to recover whatever amount might be necessary for discharging the execution. What that might be, could not be said to be plainly made out; for the bailiff, who had the execution in his hands, had made no entry of a certain payment made to him on account of the execution, and could only speak of the sum from memory.

He said he thought it was \$10. He was asked whether it was not 10*l.*, and declared that he was not certain whether it was one or the other; but he swore that whatever it was, he had given the party a written receipt for it at the time, and he thought it was only \$10.

If he was correct in saying he had given a written receipt, then it may be said, as it was not produced to contradict him, it may be supposed he was right in his recollection.

The verdict should have been about 7*l.* or 15*l.*, according as that payment should be believed to have been \$10 or 10*l.* The sum then is small at all events, and that has to be considered in this motion for a new trial.

On the other hand, we must bear in mind that the sheriff is acting in a public capacity. He was not, to be sure, under any necessity of letting the goods seized remain in the debtor's custody, and therefore was not obliged to take the security. It may be said that his doing so was a departure from his proper line of duty, and therefore that he should be left to abide all the consequences, without any peculiar consideration for him as a public officer. But we know that it is and always has been, in this Province, the common practice to let the goods, between seizure and sale, continue in the debtor's possession, upon satisfactory security being given, and not to remove them unless the sheriff is convinced that they must certainly be sold, or does not feel himself secure.

This mode of acting is very convenient in many respects. If the debt is paid before sale, and the goods are released, then much inconvenience and expense which would have attended the removal has been saved, and the debtor has been spared an exposure that would be in some cases very painful.

The practice, if it is not strictly regular, errs on the side of humanity. It may sometimes produce evil to creditors; but it is not for those who have been the means of obtaining the indulgence, or have profited by it, to object to it as improper.

It is fair then, it seems to me, to consider that the sheriff, having occasion, in a great number of cases, to take securities from parties, or to act with harshness in refusing all accommodation, stands exposed to risks, much beyond what private individuals need do in the management of their own affairs; and that there is a duty incumbent on the court in general, to see that at least he has the fair legal effect of those securities which he takes for his indemnity, so far as the court can rightly interfere to relieve him from verdicts given in disregard of the law, or upon any misapprehension of the law.

Now in this case, I thought at the trial that the defendants had not proved any one of the pleas in bar.

Conditions of bonds are to be performed strictly. They did not shew that they had the goods enumerated in the bond at Vandervorst's Inn, at any time on the 26th December, though they pleaded that they had, and that they offered there to deliver them to the sheriff. If they had shewn that, as they pleaded it, I think they would have stood acquitted of the bond; for I think, under the words of the condition, they had an option to deliver them there on that day, and that if brought there, the sheriff was bound to receive them, and could not reject them there, and reserve his right to demand them on any other day. If the defendants did not bring them to Vandervorst's on that day, then undoubtedly the sheriff could demand them on any other day; and if given when demanded, there would have been no forfeiture incurred by the not having delivered them at Vandervorst's Inn, on the 26th of December.

But all that was shewn here was, that one of the defendants told the deputy-sheriff, in the streets of Belleville, that they had the *horses* and *harness* at Vandervorst's, saying nothing of the other goods; and they gave no proof at the trial that they had in fact taken them there; but at various times afterwards they admitted that the property had been

allowed to get into the hands of strangers, and could not be produced ; and they called evidence at the trial, in order to shew that by the admission of the sheriff's officer, only a small balance on the *fi. fa.* remained unpaid, thereby seeming to admit a breach.

Upon the whole, we think there should be a new trial, and without costs ; as the jury were distinctly told at the trial, that the defendants had not substantiated any of their pleas. To throw the costs of the action in such a case on the public officer, would be unfair.

*Per Cur.*—Rule absolute for new trial, without costs.

---

TYLER V. BABINGTON.

Where, in an action for malicious arrest on a *ca. re.*, the learned judge at the trial was of opinion, that want of probable cause had not been shewn by the evidence, and charged the jury strongly to that effect, but still did not *peremptorily* direct them to find for the defendant, the court granted a new trial, without costs.

Case for malicious arrest on *ca. re.*, averring in one count, that no such debt was due, and in another, that the defendant had no reason to believe that the plaintiff was about to leave the province, &c.

The defendant pleaded, 1st, the general issue.

2ndly, To the count in which the existence of the debt was denied, that the original action was not discontinued, ended or determined, as the plaintiff had alleged.

The jury found for the plaintiff; 1s. damages.

Upon the trial, there appeared no ground to recover, so far as respected there being a good demand in the original action.

It turned, therefore, on the point, whether the defendant had or had not any reasonable cause for believing that this plaintiff was immediately about to leave Upper Canada with intent to defraud the defendant and his partner of the debt due to them ; and if he had not, then whether his conduct was malicious.

The learned judge expressed a strong opinion at the trial, that want of probable cause for the belief was not shown. On the contrary, he considered the ground for the affidavit in that respect reasonably made out ; and he recommended to the plaintiff to take a nonsuit.

His counsel preferred, however, to take his chance with the jury ; and the learned judge then left the case to the jury, with observations strongly tending to lead them to acquit the defendant ; but not *peremptorily* directing them that the defendant was entitled to their verdict, because the want of probable cause had not, in his opinion, been shewn, and that it rested with the court to determine that point.

*R. P. Crooks* moved for a new trial on the law and evidence, and for misdirection.

*Jarvis*, of Hamilton, shewed cause.

ROBINSON, C. J., delivered the judgment of the court.

Admitting it to be free from doubt, that the principle of want of probable cause is a question of law for the court to determine, as well when it concerns that part of the affidavit which relates to the defendant's belief that the debtor will leave the province, &c., as where it



concerns that part which relates to the debt (and at present I take it to be so), then I think the learned judge was well founded in his impression, that the plaintiff's evidence did not shew want of probable cause.

The debtor had failed to send the fanning mills to be sold on his account, and through which the debt was to have been paid. He was in embarrassed circumstances; and a person in the same line of business, and apparently as little likely to abscond, had not long before left his creditors without remedy, by withdrawing from the province.

I see no such evidence of that want of probable cause which should in law be sufficient to raise the inference of malice, and not the slightest other evidence of malice was given.

The learned judge who heard the testimony could best judge how far want of probable cause was made out. He thought it was not, and would have nonsuited the plaintiff; but the defendant persevered, and insisted (as he could do) on taking his chance with the jury. In other words, he called on them to overrule the opinion of the court on what was confessedly a legal question.

Under such circumstances, I think the charge to the jury should have been peremptory to find for the defendant, admitting (as we do) that the learned judge took a fair view of the evidence.

By the way in which it went to the jury, they could hardly fail to conclude that something was intended to be submitted to their judgment, upon the want of probable cause.

If they thought so, they were in error; and the fact that the jury cannot have disposed rightly and satisfactorily of the case, is evident from their verdict of 1s. damages.

If they considered that the plaintiff had maliciously arrested the plaintiff, when he had no ground, they must surely have given real damages to some amount.

If they did not think he had done so, they should have found, as they were recommended to do, for the defendant.

There may be often cases where the question of probable cause may be partly a question of fact, as when the evidence respecting some fact is inconsistent and contradictory, or where motives and intentions are to be construed for particular purposes in the case; but we see no such conflict of testimony here, nor anything but a too feeble attempt, taking all that was sworn to be true, to make out a want of probable cause.

We think there should be a new trial, without costs.

*Per Cur.*—Rule absolute for new trial, without costs.

---

#### MOUCK V. STUART.

Where an obligor binds himself, within a certain time, to convey an estate to the obligee, he must himself prepare the conveyance, and tender it executed to the obligee.

Debt on bond for not conveying land.

The question that came up on demurrer to the plea was, whether under a bond, conditioned "that the *obligor* should, for himself or the heirs of C. Stuart, deceased, *give and grant* unto plaintiff and his heirs a full

and sufficient title or deed of conveyance for 200 acres of land," &c., it was a good plea, that defendant was ready to convey, &c., but that the obligee did not tender a deed for execution.

*Campbell*, of Kingston, for the demurrer, cited *Harrison v. Livingston*, Trinity Term, 1 & 2 Vic.; 1 Sugden, V. & P. 374; 1 Esp. C. 191; Forrest, 61; *Wilson v. Dickie*, Easter Term, 7 Wm. IV.; 1 M. & W. 6.

*Breakenridge*, of Kingston, *contra*, relied upon 6 M. & W. 835; 4 A. & E. 422, N. S.

ROBINSON, C. J.—There can be nothing clearer, I think, than that the defendant, in order to save himself from the penalty of this bond, was under the necessity of making a good and sufficient title to the land, upon the obligee paying the purchase money, according to his bond. That would be the legal effect in general of a condition such as this is, which is not merely to execute a deed, when requested, or to make such conveyance as the purchaser or his counsel might devise; but it is an absolute engagement *to give and grant a good title* for the land; and in this case, the case is stronger against the obligor, because he undertakes in the alternative that he will, for *himself* or the heirs of Charles Stuart, deceased, make a title, shewing that the source from which the title was to come, was yet in doubt, depending, as we may infer, upon circumstances within the control or knowledge of the obligor, but which cannot be intended to be known to the obligee.

In such a case, the purchaser could not be expected to prepare the conveyance, because he could not tell certainly who the grantor was to be.

The obligor undertook, that in one way or the other, he would make him a good title, within a certain time.

The decisions upon this point, which I believe to have been uniform from an early period, are collected in Com. Dig., Condition H., "Conditions to make Assurances," where it is laid down, that "where the condition is to assure such land to another, the obligor must make the assurance at his peril, and is to do the first act."

In *Candler v. Fuller*, Willes, 65, the court, speaking of the same point incidentally, by way of illustration say, "as in case a man be awarded to convey an estate to another person, by such a time, he is to procure the conveyance to be made."

When he binds himself to convey, the obligation must be at least as peremptory.

MACAULAY, J.—It seems clear to me, that the defendant, to save his bond, was bound, for himself and the heirs of Charles Stuart, deceased, to give and grant to the plaintiff a full and sufficient title or deed of conveyance for the land mentioned in the condition; and that it was not incumbent upon the plaintiff to tender a deed for execution, as a condition precedent. Wherefore the plea is bad.

McLEAN, J., concurred.

*Per Cur.*—Judgment for the plaintiff on the demurrer.

## GIBB V. MORISETTE.

In declaring on a note drawn in a foreign language, it is not necessary to declare in such language; and where a foreign word is used, its meaning in English may be averred without any introductory statement that such word is of such a language, and of such a signification in English.

The plaintiff, indorsee of a note, declares against the defendant (the maker), for that the defendant made his promissory-note, and thereby promised to pay B. or order "*the sum of two hundred louis, current money, meaning thereby the sum of two hundred pounds of lawful money of Canada.*" Held on demurrer to the declaration, for unwarrantably extending the meaning of the word "*louis,*" that the declaration was good.

Indorsee v. maker of a promissory-note.

The plaintiff averred, that defendant made his promissory-note, and thereby promised, &c., to pay B. or order "*the sum of 200 louis, current money, meaning thereby the sum of 200l., lawful money of Canada,*" &c.; that B. endorsed to plaintiff.

Demurrer to declaration :—That it appearing on the face of the declaration that the note was made for the payment of money or coin not current or known in this Province, it ought to have been alleged that the note was made in foreign parts, or in a place or country where such money or coin as was therein stated is current.

2ndly, That as there is no such word, money or coin known in the English language, as "*louis,*" without a prefatory explanation, the words "*two hundred louis, current money,*" do not warrant the averment "*meaning two hundred pounds of lawful money of Canada.*"

*K. McKenzie*, of Kingston, for the demurrer.

*Burrowes*, of Kingston, *contra*, cited Wightwick, 9.

ROBINSON, C. J.—In 2 Chitty's Pleadings, 84, a precedent is given of a declaration in assumpsit, for three instalments due upon a note; and the plaintiff there, after setting out the note, claims a sum of money, viz., &c., for three of the said instalments, &c.

Here, the plaintiff does not collect in his declaration and shew in one sum what amount he claims, but leaves that to be gathered by computation, having stated what the amount of each instalment is, that three of them are due, and that the defendant has not paid them, *or any part thereof*.

This way of declaring, however, cannot be said to leave anything uncertain, since there can be no doubt what the three instalments amount to; and certainty, to a general intent, is sufficient in a declaration.

On the argument, indeed, the only objection that seemed to be insisted on was that which respects the statement, that "*two hundred louis current money means two hundred pounds of lawful money of Canada.*"

It is objected, in the first place, that the note should have been shewn to have been made in some foreign country, being made for the payment of money or coin not current or known in this Province. But a note may be made payable in the currency of any country, as for so many pounds of Irish money or Irish currency, though there be no

coin representing an Irish pound (Chitty on Bills, 133); and I know nothing to prevent such a note being made in England, as well as in Ireland.

As to the other objections connected with this peculiarity in the note, we do not know judicially that there is in any foreign country an actual coin by the name of a "louis," in which case it might have been necessary to aver, that the 200 louis were equal in value to a certain sum in our money, as is the form of declaring upon notes made payable in dollars or in pounds sterling.

We do know judicially, that by our statutes, 36 Geo. III. ch. 1, and 49 Geo. III. ch. 8, a French coin called a "louis-d'or," coined before the year 1795, was made current in Upper Canada, by the former act at the value of 1*l.* 2*s.* 6*d.*, by the latter at 1*l.* 2*s.* 8*d.*; but we know also, that if the French gold coin called "louis-d'or" was identical with a "louis," both those acts have long since been repealed, and there is now no such French coin, nor any coin called a "louis-d'or" or a "louis," made current in Canada.

Then, for all we know judicially, "louis" may be in fact a word in use, either in Lower Canada or elsewhere, to express an amount equal to a pound of our current money, and not having reference to any certain coin; as in Lower Canada, the word "piastres" is known to be used as another word for dollars.

We do not judicially know, that where this note was made (be that where it may), the word "louis" is not generally understood to mean a pound of our current money.

I believe that it does mean that in Lower Canada; and the plaintiff is bound to prove that it does mean that, as used in this note, because he has averred it.

We cannot hold upon demurrer, that he is unwarrantably extending the meaning of the word "louis." It may be used as a word equivalent to "pound;" and if so, I do not know by what explanation the plaintiff could make the matter clearer.

The note might have been made payable to the plaintiff by some well-known designation, not being his true name, but well understood to mean him; and that, I think, would constitute a case like the present in principle.

The plaintiff could only aver that he was the person meant, though it might be said that without explanation, he was unwarrantably extending the meaning of the writing.

The declaration at first sight appears questionable; but I see no ground on which we should hold it to be insufficient.

MACAULAY, J.—The cases shew that it is not necessary to declare, on a note drawn in a foreign language, in such language; and that where a foreign word is used, its signification or meaning in English may be averred, without any introductory statement that such word was of such a language, and of such a signification in English.

The court, it is said, may take notice of the meaning of foreign words; and if not, the meaning may be described in English.

The inuendo, without prefatory matter, does not extend the meaning; it merely translates the word, or alleges its meaning, which meaning does not otherwise distinctly appear; and in relation to the point



before us, the objection in the case of 2 Dowl. 775; 4 M. & P. 870, does not apply.

McLEAN, J., concurred.

*Per Cur.*—Judgment for plaintiff on demurrer.

---

COX v. COX.

To an action on a note the defendant pleads, that he was induced to make the note by the *fraud, covin and misrepresentation* of the plaintiff. The plaintiff *replies*, that he did not cause the defendant to make the note by *fraud, covin and misrepresentation*, in manner and form. &c. *Held* on demurrer to replication for duplicity, replication good.

This was an action of assumpsit on a promissory-note.

Defendant pleaded, that he was induced to make the note by the fraud, covin and misrepresentation of the plaintiff and others in collusion with him.

The plaintiff replied, that he did not cause the defendant to make the note, through and by means of the *fraud, covin and misrepresentation* of the plaintiff and others in collusion with him, in manner and form as the defendant had in his plea alleged.

The defendant demurred specially to this replication, on the ground that the plaintiff endeavoured to put in issue the making of the note by *fraud, covin and misrepresentation* of plaintiff, *either* of which would be sufficient to bar the plaintiff's recovery in this action.

*Boomer*, of Niagara, for the demurrer, relied upon 2 D. & L. 860.

*Eccles*, contra.—2 D. & L. 172; 1 D. & L. 969; 1 Stra. 245; 10 M. & W. 634; *Lacy v. Spencer*, 3 U. C. R. 161; *Dee v. Cavanagh*, 1 U. C. R. 380.

ROBINSON, C. J.—This replication is not, in my opinion, bad for duplicity; it takes issue on the defence in the terms of the plea, and does not oblige the defendant to prove more than will be sufficient to sustain his defence.—*Dee v. Cavanagh*, 1 U. C. R. 380. It comes within the principle of the decision in *Eden v. Turtle*, 10 M. & W. 634.

The courts have continually treated the plea of "*fraud, covin and misrepresentation*" as one defence. The most approved precedents agree with this plea. If it be not a single defence, then the defendant's plea would be double, and he could not complain of a fault in the plaintiff, produced by his own bad pleading.

Misrepresentation constitutes legal fraud, though morally speaking, there would be no fraud, unless the plaintiff knew the representation he was making to be false; and it is in this sense that the term "*misrepresentation*" seems to be used in pleas of this kind.

The effect on the contract being the same, whether the misrepresentation was wilful or not, the law places it on the same footing, and the defences are not in fact pleaded as distinct.

The usual and more correct form of replying to such a plea, is to plead disjunctively, that the note, &c., was not obtained by the fraud, covin or misrepresentation (3 Chitty's Pleadings, 423); but as it has been determined that the plead of fraud, covin and misrepresentation is not double, I do not see how we can consistently call the replication double, in following the very same language.

We could not at the same time hold, that fraud, covin and misrepresentation, in a plea, form but one defence; and yet hold a replication double, because it denies the same defence, and that only, which the court has admitted to be single. *Pascoe v. Vyvyan*, 1 Dow. N. S. 939; 3 Chitty's Pleadings, 423. That a plea in that form constitutes but the single defence of fraud, may be inferred from the manner in which it is constantly pleaded; as in 3 Chitty's Pleadings, 34, 35, 176, 428, 451.

The case of *Robson v. Luscombe* (2 Dow. & L. 859) is not in accordance with this view which we take of the plea; but the point there was little discussed. The opinion of a single judge only was expressed upon it, and not given by him as the deliberate judgment of the court. The plaintiff was advised to amend.

MACAULAY, J.—The real objection is not that the replication is double, &c., but that the traverse is too large, denying conjunctively the fraud, covin and misrepresentation, instead of disjunctively, fraud, covin or misrepresentation.

This objection is not pointed out as a cause of demurrer.

The argument of the defendant is founded on the assumption that the plea is double, and embraces more than one joint ground of defence; but where a plea is double, the plaintiff must, if he does not demur thereto specially for that reason, answer the whole plea; and if he does, the defendant cannot then object that the replication is double, by reason of its traversing the whole of a bad plea.—7 A. E. 161, *Reynolds v. Blackburn*; Tyr. Plea. 630; 3 A. & E. 323, *Chitty v. Dandy*.

Besides *de injuriâ* has been held a good replication to the plea of fraud; and if so, it seems to shew that a traverse in detail is equally admissible; for *de injuriâ* is in effect a traverse of the whole plea.

A plea like the present was, in *Lacy v. Spencer* (3 U. C. R. 169) held good; and if the effect of a replication, traversing such plea conjunctively, is not to impose upon the defendant the onus of proving more than a traverse taken in the disjunctive, it would seem unobjectionable.—10 M. & W. 635; 1 Hodges, 39.

Tried by this test, the present replication (though contrary to the usual forms, and though it traverses the plea conjunctively) would seem good; for it does not impose upon the defendant the burthen of proving anything more than a replication of *de injuriâ* (which, it is said, may be replied to such a plea).—Tyr. Plea. 619.

In other words, it only renders fraud (undefined in its particulars) the substance of the issue; and fraud being proved, the issue would be established in favour of the defendant.

If the plea is not double, and if *de injuriâ* might be replied, I see no good reason why such a plea may not be traversed in the conjunctive.

If the plea is double, then it is said the defendant cannot take advantage of the fault of his plea to make the replication bad.—7 A. & E. 161.

*Robinson v. Lumley* (2 D. & L. 860) is against this view; but there no express decision was made on the point, the plaintiff amending, upon the suggestion of the court. And the above seems to me to be the correct inference from *Lacy v. Spencer* and 10 M. & W. 635.

McLEAN, J.—In the case of *Lacey v. Spencer* (3 U. C. R. 161), a plea in the common form, that a deed was obtained by fraud, covin and misrepresentation, was objected to, on the ground that the fraud was not particularized; but the plea was held good. And in reference to the case of *Robson v. Luscombe* (2 Dow. & Lowndes, 859), in which Baron Parke expressed a doubt whether a plea, stating a note or deed to have been obtained by fraud, covin and misrepresentation, was not bad, on the ground that it ought to have been averred that the misrepresentation was fraudulently made, this court held, that they were not warranted in taking it as an authority for holding a form of pleading to be bad, which had been sanctioned by long usage, under the observation of eminent pleaders and judges. This was in reference to the objection taken in *Lacey v. Spencer*, that the fraud was not set out; but it will equally apply to any objection to a plea, on account of its alleging an instrument to have been obtained by fraud, covin and misrepresentation.

When a defendant makes such an allegation, it must be presumed that he intends to prove it; and he ought not to complain, that the plaintiff, in denying such allegation in his own words, puts him to that proof.

But if the defendant could be required to prove anything more, when the fraud, covin and misrepresentation, are denied conjunctively, than when denied in the disjunctive, there might be some ground of objection.

The proof, however, of *fraud*, or covin, or misrepresentation, amounting to legal fraud, is all that could be necessary, and would be necessary in either case; so that the defendant's situation is not rendered more difficult in the one case than in the other.

If the plea alleging fraud, covin and misrepresentation, is considered not to be double, and asserting but one defence, it must be that these terms are regarded as so far synonymous, that the last two expressions, covin and misrepresentation, must be taken to mean such legal fraud as justifies a defendant in resisting an action; and if the plea be not double, I cannot see how a replication in the very words of the plea can be so considered.

As the defendant will only have to prove the truth of his own plea, and cannot be called upon to shew more than if the replication denied the note to have been procured by the fraud, covin or misrepresentation of the plaintiff, the special cause assigned for the demurrer in this case, and which goes upon the assumption that *fraud*, *covin* and *misrepresentation*, require or may admit of different degrees of proof, seems to me to fail. Judgment must therefore be for the plaintiff.

*Per Cur.*—Judgment for the plaintiff on demurrer.

---

DAVIS V. MOORE ET AL.

The plaintiff declares in trespass, for breaking and entering the plaintiff's close, in the *Niagara District*, &c. The defendant pleads, that being bailiff of a Division Court in the *District of Brock*, he committed the alleged trespass in the discharge of his duty as such; and that no notice was given to him of the action, one month before it was brought. Demurrer to the

plea, on the ground that it is not shewn by what authority the defendant, though a bailiff in the *District of Brock*, acted in the *District of Niagara*, where the trespass is laid. *Held*, plea bad.

Trespass for breaking and entering plaintiff's close, in the *District of Niagara*, and taking away certain property of the plaintiff.

One of the defendants, Henry Leister, pleaded, "that at the said several times when, &c., in the declaration mentioned, he was bailiff of the Division Court for the 3rd division of the *District of Brock*; and that he, as such bailiff, then committed the several supposed trespasses in the said declaration mentioned, after the passing and by virtue and in the execution of a certain act of the parliament of this Province, passed in the session of parliament held in the 4th and 5th years of the reign of her Majesty Queen Victoria, entitled 'An Act to repeal the Laws now in force in that part of this Province formerly Upper Canada, for the Recovery of Small Debts, and to make other Provisions therefor.'"

"And the defendant further saith, that no notice in writing of this action, or of the causes thereof, was given to him the said defendant, one calendar month before the commencement of this action; and this he is ready to verify, &c."

Demurrer to plea:—"That it was not shewn, nor did it in any manner appear by said plea, why or by what means or authority the said defendant, Henry Leister, committed the several trespasses in the declaration complained of, nor did it appear that the said Henry Leister had any jurisdiction within the District of Niagara, wherein the said trespasses are by the declaration charged to have been committed; but on the contrary, he is by the said plea stated to have been a bailiff of the Division Court of the District of Brock. And for that it was not in the said plea alleged, whether or not any notice in writing of the causes of this action was ever served upon the said Henry Leister, nor, if any were, when or how the same was served; thereby leaving the allegation of want of notice uncertain and argumentative."

*H. Eccles*, for the demurrer. The defendant should have shewn in what respect he claimed to act as bailiff. It appears on the record that he acted without the limits of his authority; and any special circumstances which might have given him authority, are not stated. A defendant, justifying under an act, must plead strictly. He should have said that he did the act "in pursuance of the statute," and not "by virtue and in execution of the act," he did, &c. Suppose his averment traversed, it would have been a traverse upon a matter of law. *Virtute cuius* cannot be traversed.—1 Ch. Plead. 641.

*J. H. Hagarty*, contra.—If defendant had pleaded, setting out a number of facts giving him on the record a *prima facie* right to notice, under the statute, the plea would have been bad for duplicity.—Ch. Jun. Pre. 217.

*Eccles* in reply.—There would have been no duplicity in stating all the facts as mere inducement to his claim of notice.

ROBINSON, C. J.—I am of opinion that this plea is bad.

The defendant, as bailiff of a Division Court in the District of Brock, has no right, that I can see, upon this record, to commit a trespass upon any person's close in the District of Niagara, or to break his gates, or to take his cattle, and convert them to his own use.



If, by possibility, such circumstances did exist as would entitle him to notice, under the construction given to such clauses in acts of parliament, as that referred to, 4 & 5 Vic. ch. 3, sec. 61, they should have been set forth.

I do not hold that he was bound to set out facts which would have shewn him to have a perfect legal justification, to entitle him to notice ; for that would be to hold, that in order to shew his right to notice of action, he must set out what he probably could not have proved, though his right to notice does not depend upon his having acted strictly within legal limits, and in conformity to the statute.

But I think that his plea should have been such as to shew that he might at least have been acting *bona fide* in the supposed execution of his duty, under the statute, and should not have shewn a case which *prima facie* repels any such conclusion.

MACAULAY, J.—This plea is certainly bad. For anything done in pursuance of the act, the defendant would be entitled to notice, &c. ; but no facts are pleaded to shew that such was the case.

The plea is matter of law as much as fact. It is at best a conclusion or inference of law and fact, from facts not stated.

If in the plaintiff's evidence the facts necessary to shew the right to notice appeared, it is said the defendant might raise the objection under the plea of "not guilty," though not pleaded per statute, which the present act does not allow.—Tyr. Pleadings, 160.

However this might be, the defendant should have stated what the facts were, so that if true, the court might be enabled to judge whether the trespasses complained of were committed in pursuance of the statute ; and this is not done.—Tyr. Pl. 451, 2 ; 3 Bing. 950, N.S. ; 5 Scott, 154, S. C.

MCLEAN, J.—If the defendant means to justify a trespass committed in the District of Niagara, or to avoid an action from the want of the notice required by law to be given to him as a bailiff, he must shew that he was acting as bailiff, at the time of the alleged trespass, within the District of Niagara.

He alleges, in general terms, that he was acting as bailiff under the statute establishing the Division Courts ; but being a bailiff of a court within the District of Brock, he shews no authority for acting in that capacity beyond the limits of his division.

His plea is defective in this respect ; and judgment must therefore be given for plaintiff on this demurrer.

*Per Cur.*—Judgment for plaintiff on demurrer.

---

#### BEAMER V. DARLING.

In an action of trespass for an arrest under a *ca. re.*, against the plaintiff arresting, there is no necessity to set out in the declaration the affidavit to arrest.

*Semble*, that a declaration in trespass for assaulting, seizing and laying hold of the plaintiff, and *pulling and dragging him about*, the plea justifying the arrest by virtue of legal process, was no answer to "the pulling and dragging him about."

Trespass for assaulting and seizing the plaintiff, and with great force

and violence pulling and dragging him about, compelling him to go through the streets, and imprisoning him.

2nd and 3rd pleas, as to the assaulting, seizing and laying hold of the plaintiff, and *pulling and dragging him about*, as in the declaration alleged, &c., justified, arresting under a *ca. re.* simply, *quæ sunt eadem*.

Special demurrer :—The pleas did not justify the alleged *pulling and dragging* about.

General demurrer :—That the plea did not shew that an affidavit of debt was made according to the statute, either by the plaintiff in the suit or by the defendant as his agent.

*H. Eccles*, for the demurrer, gave up the special cause of demurrer, on the authority of *McLeod v. Bell* (2 U. C. R.); but contended that the plea was bad, in not setting out the affidavit to arrest. Had the action been brought against the sheriff, and not against the plaintiff in the suit (as in this case), the averment with respect to the affidavit might have been unnecessary. Here the allegation could not be dispensed with.—10 B. & C. 206.

*P. M. Vankoughnet*, contra, relied upon 1 Saund. 296 ; 3 Dowl. 720, as supporting the present plea.

ROBINSON, C. J.—The plaintiff in this cause abandoned, upon the argument, the only ground of demurrer specially assigned, giving as his reason the decision of the court upon a similar objection in *McLeod v. Bell* (2 U. C. R.), sustaining the plea so far as that supposed exception was concerned.

It does not appear to me that such is the effect of that decision ; but as the objection in question is one of a merely formal nature, it is sufficient that the plaintiff has for any reason waived it.

With respect to the other objection, that no affidavit to arrest is set out in the plea, it appears to me to be clearly untenable.

It is true that the case of *Nightingale v. Wilcoxon* (10 B. & C. 202) was an action against the sheriff for an escape, and not, as this is, against the party who sued out the process ; but the case of *Beddell v. Pakenham* (3 Dow. 720) shews, that in an action brought against the plaintiff in the original action, it would be equally unnecessary to aver that the endorsement was made by virtue of an affidavit, as required by law.

The want of an affidavit, or fatal defects in it, would not make the *capias* void on the face of it ; and the party, as well as the sheriff, could justify under the writ, so long as it was not set aside.

The form of the plea in that case was like the present, without any mention of an affidavit being made ; and though it was replied by the plaintiff, that the affidavit under which the writ was sued out was defective, yet the court, upon demurrer, determined that to be no reason why the plaintiff in the original action could not justify under the *capias* ; and the reasoning in that case, and in *Nightingale v. Wilcoxon*, as well as the form of declaring in use, are all in opposition to the objection now urged.

Besides, it is averred that this writ was *duly* endorsed *for bail* ; and the defendant has demurred specially, for want of setting forth the affidavit.

MACAULAY, J.—The case of *McLeod v. Bell* did not decide that the

present plea was good, notwithstanding the objection assigned on special demurrer; but the special demurrer having been abandoned on the argument, I do not think the objection taken on general demurrer tenable. The writ must be taken to have been correctly issued, till the contrary appears, according to the *dictum* of Bayley, J., 10 B. & C. 216.; 3 Dowl. 720.

McLEAN, J., concurred.

*Per Cur.*—Judgment for defendant on demurrer.

---

FISHER ET AL. V. THE CITY OF KINGSTON.

The plaintiffs sue a corporation in debt, and recover only 5*l*. The plaintiffs move the court *in banc* to be allowed Queen's Bench costs, upon the ground that it was impossible for them to proceed against the defendants in the District Court, by reason of their being a corporation. The court ordered Queen's Bench costs in this suit to be taxed for the plaintiffs, as it was the first in which such a question had been raised; but they intimated an opinion, that a corporation could be sued in the District Court, and that upon the point again coming before the court, they would grant a rule *nisi*, and have the matter formally discussed.

The plaintiffs sued in debt, upon a sealed debenture given to them by the defendants, for a debt of 34*l*., due to them for work and labour.

The defendants suffered judgment to pass against them by default, and damages were assessed at 4*l*. 17*s*. 1*d*.

Campbell, of Kingston, moved, for the plaintiffs, for an order to tax Queen's Bench costs, under the rule of court, Easter Term, 11 Geo. 4, assigning as the ground, that it was impossible for them to proceed against the defendants in the District Court, by reason of their being a corporation; that no *capias* could legally issue against them; and that there was no authority for proceeding in that court by summons and *distringas*, adopting the English practice in such cases, or by summons under our rule, 2 Wm. IV., which could apply only to this court.

ROBINSON, C. J., delivered the judgment of the court.

It has not been shewn that the plaintiffs in this case, or the plaintiff in any other case, have attempted to sue a corporation in a District Court, and found themselves unable to proceed. It rests solely on the opinion entertained by the plaintiffs, that they could not succeed in such an attempt.

The city of Kingston is incorporated by the statute, 9 Vic. ch. 75, which incorporates the inhabitants of the town by the name of the "City of Kingston," and enacts that the corporate body "may sue and "be sued in all courts of law and equity, and in all manner of actions." Then, here is a corporation created for municipal purposes, over which jurisdiction is undoubtedly given to the District Court, as clearly as to this court, in all such cases as are within the scope of their general jurisdiction.

Our statute, 3 Wm. IV. ch. 7, in order to facilitate proceedings against corporations, gives a certain and easy method of serving all writs and process upon any corporate body, by allowing them to be served on the president, presiding officer, cashier, secretary or treasurer of such



corporation, in the same manner as upon any defendant in his natural capacity, or in such manner as the court in which the action shall be brought may direct.

This clause shews, that the legislature contemplated the case of corporations being sued in other courts as well as in this.

It is true, that the statute creating the District Courts requires them to proceed by *capias ad respondendum*, as their original process for compelling the appearance, and making no exception in regard to corporations; but it provides for making it in effect a summons, whenever bail shall not be required, by directing a copy to be served, with a notice endorsed (according to the common practice of the court), in cases non-bailable. Then, though a *capias* in form, it may, I think, be regarded as mere serviceable process, and there would seem to be no very good reason why it may not be served on the corporation, as pointed out by 3 Will. IV. ch. 7, the only object being to compel the corporation to enter an appearance, or to enable the plaintiff to appear for the corporation.

The rule of this court allowing a summons to be used, no doubt, has no application to the District Courts; but it only shews, that in the opinion of this court, at that time there was no other proceeding in the power of the party, than by summons and distringas according to the English practice.

That rule was made before the passing of the act, 3 Wm. IV. ch. 7; and it does not appear that the judges who made the rule referred to, before it was passed, would have thought that there was any difficulty in making use of a non-bailable *capias* as mere serviceable process, in the case of a corporation, if such an act had then been in force.

There is something repugnant in the direction which a *capias* must contain to the sheriff, to take the City of Kingston if it shall be found in his district; but the form of a summons would be scarcely less so, if the direction and notice are to be understood literally. But I think it is no strained construction, to regard the *capias* not bailable as mere serviceable process, and to allow it to be used for that purpose, in order to summon a corporation, as well as to summon an individual.

The 3 Wm. IV. ch. 7, being passed in advancement of justice, should be liberally construed. A mere fiction of law should therefore not be allowed to prevail, to the prejudice of the facility it was intended to afford.

The District Court Act, taken in connection with that statute, I think, allows us to look upon the copy of *ca. re.* not bailable, with the notice endorsed upon it, as being in effect a summons; and when under this merely serviceable process, the corporation having been duly notified to appear, does or does not appear, the intention of 3 Wm. IV. ch. 7, is answered, and the proceedings can thenceforward go on without difficulty, just as in a case against an individual defendant.

We do not know that the plaintiffs in this case would have found, or have in fact found, any obstacle to suing in the District Court.

If, in making the attempt to sue a corporate body in a District Court, a party should find the opinion of that court against him, then this court would probably be called upon by appeal to consider the question.

If we should then, after examination, hold the proceeding regular, the



difficulty would be removed, which has led to this suit being brought in the more expensive jurisdiction.

If the question shall not be brought before us in this formal manner, and we should be asked again, upon an application of this kind, to grant Queen's Bench costs, upon the assumption that the plaintiff could not have sued the corporation in a District Court, then we shall think it proper, after this intimation of our view of the question, to grant a rule upon the defendant to shew cause, before making any order; and upon the return of such a rule, the point will be fully discussed. It may then be found difficult, if not impossible, to reconcile the opinion, that a non-bailable *ca. re.* may issue against a corporation, to be used as mere serviceable process, with what has been assumed to be necessary in regard to persons privileged from arrest; and as the idea, that the same principle must govern throughout, may have led the plaintiffs reasonably to conclude that they could only sue in this court, we make the order in this case for costs.

*Per Cur.*—Order granted for Queen's Bench costs.

---

FRENCH V. KINGSMILL, SHERIFF.

The plaintiff declares upon a judgment, and gives the following description of the Court of Queen's Bench in Toronto:—"For that whereas the said plaintiff, in the 9th year of the reign of our lady the now Queen, in the *Court of our said lady the Queen before the Queen herself, by judgment* of the same court, recovered a judgment, &c., as by the record still remaining in the *same court* of our said lady the Queen, before our said lady the Queen, at *Toronto aforesaid*, more fully appears." *Held*, on demurrer to this description of the court as being uncertain—description good.

The plaintiff declared in debt, on a judgment. The declaration contained the following averment. The plaintiff complained, for that whereas the said plaintiff, in the 9th year of the reign of our lady the now Queen, in the *court of our said lady the Queen before the Queen herself, by judgment* of the same court, recovered a judgment, &c., as by the record thereof still remaining in the *same court* of our said lady the Queen before the Queen herself, at *Toronto aforesaid*, more fully appears, &c. (Toronto not being before mentioned.)

Demurrer to the declaration, "that the court in which the said judgment is alleged to have been recovered, is uncertainly described, and it is not stated whether it is the court of our said lady the Queen in England or elsewhere; and if it is intended as a description of this honourable court, it is an insufficient and incorrect description thereof; and also, that the said 1st count is in other respects uncertain, informal and insufficient."

*P. M. Vankoughnet* for the demurrer.

*H. Eccles*, contra.

ROBINSON, C. J.—There is nothing, I think, in the objection which the defendant has assigned here as cause of demurrer.

When we speak in this province of the court of our lady the Queen before the Queen herself, we are always to be understood as speaking of the Queen's Bench in this Province, of that court in which the Queen is, by legal fiction, always considered to be present.

There is no more reason that, when we speak of the Court of Queen's Bench, without further explanation, we should be taken to mean the Court of Queen's Bench in England ; than that when we use the word "pounds," in our legal proceedings, we should be understood as speaking of pounds sterling, and not of the legal currency of the Province.

We are never understood to be speaking of countries beyond our jurisdiction, unless there is something to shew that to be intended.

The manner in which the Court of Queen's Bench is described in this declaration, so far as regards the mere objection, that the exact name given to the court by statute is not used, is such as has at all times been in common use in our records.

Its import is well understood, and has received legal sanction, by having been adopted from the beginning, and passing always under the eye of the court unquestioned.

It is abundantly evident on the face of both these counts, that it is the Court of Queen's Bench in Upper Canada that is spoken of; for the record of the judgment is averred to be "remaining *in the said court* "of our said lady the Queen, before the Queen herself, *at Toronto*;" and the execution is said to have been "sued out of the said court of "our said lady the Queen *at Toronto*," thereby shewing, that if the locality of the court did not clearly appear when it was first mentioned, it is clearly enough stated in the same count ; and the effect is the same, whether it is stated in one part of the count or in another.

It is quite true, that by the 2 Vic. ch. 1, a certain name is given to the court ; and so there was by the first King's Bench Act, 34 Geo. III. ch. 2 ; but the precise name has not been always or generally, if indeed ever, used in pleadings.

The court has been described in the terms used in speaking of the corresponding court in England, there being no difference between the import of the words used and the designation given in the statute.

This is not the case of the court suing, like a corporation, in its own behalf, in which case its proper name ought to be used, though an unreasonable degree of strictness is not enforced even in such cases with corporations.

The court is spoken of in stating the inducement to the action ; and it is sufficient, if the meaning is plain. The *King v. Basset* (1 M. 235) shews the difference where a variance occurs, not in setting out a contract or the tenor of an instrument, but in making a statement of a matter where the meaning is obvious and notorious, so that what is intended cannot fail to be understood.

I fear, if this should be held to be an insufficient designation of the court, almost every process sued out might be set aside for irregularity, and every judgment in an action upon a judgment of this court might be held to be erroneous.

It is very rare that either the legislature in their own acts, or any pleader in civil or criminal cases, gives to the court the full and precise style assigned to it by the statute creating the court.

It is sufficient that the common course of pleading is followed, and that there can be no doubt what is meant.—2 Saunders, 59, (a); 1 T. R. 235 ; *Rex v. Hare et al.*, 1 Str. 146-302.

MACAULAY, J.—The suit is brought in this court, and the declaration

alleges a judgment recovered in her Majesty's court before the Queen herself, verifying the *record* as being in the same court at *Toronto*.

Taken together, this, I think, sufficiently indicates that the judgment was recovered in this court, that a plea of *nul tiel record* would have put in issue such a record, and that it would be the proper plea.

Is there any other court, of which we can take judicial notice, to which this declaration more properly relates? and if not, must we not regard it as alleging a judgment recovered in this court, the only one that we can notice, which it can be understood as referring to.

McLEAN, J., concurred.

*Per Cur.*—Judgment for plaintiff on demurrer.

### DOWDING V. EASTWOOD.

The plaintiff, the endorsee of a note, declares against the endorser, to whose order the maker had made the note payable. *The defendant is averred to have endorsed the note to the plaintiff.* The defendant pleads by way of special traverse, admitting in the inducement the making and endorsing of the note as in the declaration mentioned, and then sets out a charge of usury between the maker and one A. B., to whom it is averred the maker delivered the note; and that A. B. afterwards delivered the same to the plaintiff, who received the same with knowledge of the usury, "without this, that the defendant did endorse the said note in the said declaration mentioned, in manner and form as the plaintiff hath above thereof complained against him; and of this the defendant puts himself upon the country, &c." Special demurrer, that no certain or material issue was offered or could be taken upon the plea, and that it ought to have concluded with a verification. *Held*, plea good on the exceptions taken.

*Semle*, however, that the plea is bad for duplicity.

Endorsee v. the endorser of a note.

For that whereas one Wm. Ketchum, on the 28th of April, made his note, &c., and promised to pay the defendant or order, &c., and defendant endorsed the same to plaintiff, whereby, &c.

Plea, "that heretofore, to wit, on the 28th day of April, 1846, the said William Ketchum made the said promissory note in the said declaration mentioned, and the defendant, at the request and for the accommodation of the said William Ketchum, endorsed the said promissory note in the said declaration mentioned. And the defendant further says, that after the making and endorsing of the said promissory-note, and whilst the same was in the possession of the said William Ketchum, and whilst he the said William Ketchum was the holder thereof, and before the same was delivered to the said plaintiff, it was, corruptly and against the form of the statute in such case made and provided, agreed by and between one Frederick Chase Capreol and the said William Ketchum, that he the said Frederick Chase Capreol should lend and advance to the said William Ketchum a certain sum of money, to wit, the sum of 117*l.* of lawful money of Canada; and that he the said Frederick Chase Capreol should forbear and give day of payment of the said sum of 117*l.*, from the time of lending and advancing the same until and upon a certain other time, to wit, the 27th day of July, in the year of our Lord, 1846; and that for the forbearing and giving day of payment of the said sum of 117*l.* as



"aforesaid, he the said William Ketchum should give and pay to the said Frederick Chase Capreol a certain sum of money, to wit, the sum of 8*l.* of like lawful money; and that for securing the payment of the said sum of 117*l.* so to be lent, advanced and forborne as aforesaid, together with the said sum of 8*l.* so agreed to be paid for the forbearance and giving day of payment of the said sum of 117*l.* on the said 27th day of July, in the year last aforesaid, he the said William Ketchum should transfer and deliver over to the said Frederick Chase Capreol the said promissory note so made, drawn and endorsed as aforesaid. And the defendant further saith, that in pursuance and part performance of the said corrupt and unlawful agreement, the said William Ketchum afterwards, to wit, on the said 7th day of May, in the year last aforesaid (being the holder of the said promissory note so made, drawn and endorsed as aforesaid), transferred and delivered over the same to the said Frederick Chase Capreol, on the terms aforesaid; and that in further pursuance of the said corrupt and unlawful agreement, the said Frederick Chase Capreol afterwards, to wit, on the day and year last aforesaid, did lend and advance to the said William Ketchum the sum of 117*l.* And the defendant further saith, that the said sum of 8*l.* so agreed to be given and paid by the said William Ketchum to the said Frederick Chase Capreol, for such loan and forbearance as aforesaid, exceeds the rate of 6*l.* for the forbearing of 100*l.* for a year, contrary to the statute in such case made and provided. And the defendant further saith, that the said Frederick Chase Capreol, having so become possessed of the said promissory-note, under and in pursuance of the said corrupt and unlawful agreement, afterwards, to wit, on the day and year last aforesaid, transferred and delivered the same to the said plaintiff, and the said plaintiff received the same with full knowledge of the said corrupt and unlawful agreement, under and in pursuance whereof he the said Frederick Chase Capreol had become possessed of the said promissory-note. Without this, that the said defendant did endorse the said promissory-note in the said declaration mentioned, in manner and form as the said plaintiff hath above thereof complained against him the said defendant; and of this he the said defendant puts himself upon the country."

Special demurrer:—That no single, certain and material issue was offered or could be taken upon the plea; and also, that the plea ought to have concluded with a verification.

*J. W. Gwynne*, for the demurrer.—The plea is bad upon two grounds. 1st, the special traverse being immaterial, it should have concluded with a verification, and not to the country. 2ndly, the plea offers no single issue, and is repugnant.—*Bank of Montreal v. Humphries et al.*, 3 U. C. R. 463; 11 M. & W. 581.

*Alex. Grant*, contra.—The plea is admitted to be bad for duplicity, if the objection had been properly taken. It is bad upon the ground pointed out in special demurrer, in the case of *Bank of Montreal v. Humphries et al.* No such objection, however, is made here on the special demurrer, at least with sufficient distinctness to enable the plaintiff to take advantage of it. If the objection "that no single issue is offered," be equivalent to saying it is double, still the objection cannot



be heard, because it does not state in what respect the plea is double.—1 Saund. 336-7, note 3; 1 Ch. Plea. 457; 13 M. & W. 167. By our rule of court, 36th rule, Easter Term, 5 Vic., special traverses, with an inducement of affirmative matter, must conclude to the country. A certain issue is clearly tendered, viz., on the endorsement, that might have been traversed; or if immaterial, the usury might have been denied.—3 D. & L. 60; 9 A. & E. 835. The plea, upon the objections taken on this special demurrer, is clearly good.

ROBINSON, C. J.—The defendant is, in my opinion, entitled to judgment on the demurrer upon the exceptions taken.

It can be no good cause of demurrer, that these pleas do not conclude with a verification; for our 36th rule, E., 5th Victoria, expressly directs that special traverses, with an inducement of affirmative matter, shall conclude to the country, as these pleas properly do; and it can make no difference in this respect, whether the traverse be material or not; for if it be not material, then the plaintiff may plead over to the inducement, as the rule allows him to do.

Then, as to the only other cause of demurrer assigned, that the plaintiff can take no single and certain issue to the plea, that cannot be conceded; because, if the special traverse be material, then that forms the issue, and it is single and certain undoubtedly; and if the traverse be immaterial, then the plaintiff had only to traverse the inducement of the usury. So it cannot be said that these pleas are such, that “no single, certain and material issue can be taken upon them.”

An idle and immaterial traverse can only be objected to on special demurrer.—1 Saunders, 14, note 2; 207, note 5.

No such cause of demurrer being assigned here, and the traverse being in fact immaterial, the plea is to be looked at as a plea confessing and avoiding the plaintiff's title as holder of the note sued on; and the matter in avoidance might therefore have been replied to.

MACAULAY, J.—The plea is an informal special traverse, and does in effect deny the alleged endorsement, perhaps not in fact, but in legal effect, by reason of the usury stated in the inducement.

Duplicity is not pointed out as a cause of special demurrer.—2 Vent. 212; Yel. 151; 2 Q. B. 835.

Had the plaintiff added the similiter, and gone to trial, the traverse would have raised a distinct issue.

Whether, in the event of a verdict for the plaintiff, such issue would be held material, is not the present question.

It might be, that had the plaintiff pleaded to the inducement, his replication would have been sustained, on the ground that the traverse was idle after such an inducement; but instead of doing so, the plaintiff has demurred on grounds that do not appear to me in themselves sufficient, though I think the plea is clearly bad on other grounds of special demurrer not pointed out with sufficient distinctness.

MCLEAN, J.—This case is precisely like the case of the Bank of Montreal v. Humphries et al., 3 U. C. R. 463.

In that case, as in this, the defendant did in effect confess the indorsement to the plaintiff of the note declared on, but went on to shew a cause for avoiding the payment, by reason of alleged usury in reference to the note between the party from whom the plaintiff received it, and

the maker of the note, and then concluded as in this case, by traversing or denying the indorsement, which he had previously confessed. The plea in that case was demurred to, and adjudged to be bad for duplicity, and there seems to be no doubt, that the 3rd and 4th pleas in this case are bad on the same ground.

But the plaintiff has not alleged duplicity as a ground of objection, and we can only dispose of the pleas on the objections which he has taken, which are, first, that no single certain and material issue is afforded by, and can be taken on these pleas; and secondly, that they ought to have concluded with a verification, instead of to the country.

As to the latter objection, the 36th new rule expressly requires, that special traverses, or traverses with an inducement of affirmative matter, (as in this case), shall conclude to the country.

But the opposite party is not precluded from pleading over to the inducement, *when the traverse is immaterial*.

The traverse denying the indorsement by Eastwood to the plaintiff, could not be considered as immaterial, and upon it, a single certain and material issue could be taken; but if the traverse were immaterial, the conclusion to the country could not prevent the plaintiff from taking a certain issue on the inducement, as to the fact of usury therein stated; so that issue might be taken on the traverse if material, or on the inducement if the traverse were immaterial.

The plaintiff's causes of demurrer therefore fail, and the defendant is entitled to judgment.

*Per Cur.*—Judgment for the defendant on demurrer.

---

#### KITSON V. SHORT.

A., a wharfinger and warehouseman, receives a hogshead of sugar to be stored in his warehouse—it belonged to B., but, through mistake, it was delivered by A.'s servant to C., who came and claimed it as his—B. hearing of it convinces A. that he has made a mistake in delivering it to C., and A. pays B. the price of the sugar, and brings his action on the common count for money paid against C.—A. recovers. *Held, per Cur.*, on motion for a new trial, that A., on these facts, need not declare specially, but could recover against C. on the common count for money paid.

Assumpsit on the common counts, for goods sold and delivered—for money paid for the defendant at his request—for money had and received, and on an account stated.

Plea, general issue.

The plaintiff, a wharfinger and warehouse-keeper at Cobourg, had received a hogshead of sugar to be stored in his warehouse; it belonged to one Hall, and, through mistake, was delivered by the plaintiff's servant to the defendant, who came in the plaintiff's absence and claimed it as his.

A hogshead of sugar, brought up for the defendant, had, by some accident, not been delivered at Port Hope, as it ought to have been; and the defendant claimed this at Cobourg, probably supposing it to be his.

When Mr. Hall heard of it, he convinced the plaintiff of the mistake, and the plaintiff in consequence paid him the invoice price of the sugar, and brought this action against the defendant, who had either sold or

used the sugar, and refused to account for it, insisting that the hogshead which he had received was his.

The jury, being satisfied of the contrary, gave a verdict against him for the sum which the plaintiff had been obliged to pay to Hall.

It was objected at the trial, that the plaintiff could not recover on any count in the declaration, whatever the fact might be, but could only bring a special action on the case.

*A. Wilson* renewed the same objection on the motion for a new trial; and relied upon 4 Camp. 81; 4 Taunt. 189; 1 Arch. N. P. 246; 2 Saund. 473; 3 A. & E. 338; 3 Bing. 610.

*P. M. Vankoughnet* shewed cause against the rule, and filed affidavits, stating that the defendant had since the trial offered to pay the verdict and costs as soon as he could be made acquainted with the amount; and relied upon 12 M. & W. 421; 8 L. J. 193; 4 Taunt. 179; as shewing that the action was sustainable in the present form.

ROBINSON, C. J.—The court discharges the rule, not only because the defendant appears to have acquiesced in the verdict since the trial, but also because they consider it was properly rendered under the count for money paid.

MACAULAY, J.—Is the defendant liable in law on the present declaration, or on a special count? This is the only question; and the court at *nisi prius* having ruled in favour of the plaintiff, this court may exercise a discretion in setting aside the verdict merely on the objection to the pleadings; and if it was set aside, the plaintiff would have leave to add a special count.

Besides, there is express authority in favour of the action on the present declaration—4 Taunt. 429; and besides, the affidavits filed, in shewing cause, state that since the trial, the defendant acquiesced, and asked for the bill of costs, &c., to settle the suit, &c.

MCLEAN, J., concurred.

*Per Cur.*—Rule discharged.

#### REYNOLDS V. O'BRIEN.

Where a witness, the payee of a note payable to bearer, and transferred to the plaintiff, proves a promise by the defendant, the maker, sufficient to take the note out of the Statute of Limitations, but cannot identify the note as the one to which the promise applied, and it is not alleged or suggested that there is any other note in existence between the parties: *Held, per Cur.*, that the not having identified the note is no legal defect in the evidence of the witness as to the promise to pay; and that, when the witness spoke of the promise, the identity of the note was to be presumed.

Appeal from the District Court of the District of Victoria.

The defendant was sued on a small note, made to one McMullen or bearer in 1827, payable in 1829, and on which two small payments were endorsed—the last made nearly ten years ago.

The note was denied, and the Statute of Limitations pleaded.

The handwriting of the defendant was clearly proved. The note was shewn to have been transferred to this plaintiff only a short time before the action brought, but sworn to have been transferred for good consideration.

The only evidence to take the case out of the Statute of Limitations



was that of McMullen, the payee and late holder, who swore that the defendant had promised to pay him the note two years ago. He could not, however, identify the note as being the one to which the promise referred; and upon that ground the learned judge below directed the jury to dismiss his evidence from their consideration.

A new trial was moved for, on this ground of misdirection, and refused. Judgment appealed from.

*D. B. Read*, for the appeal.

*J. H. Hagarty*, contra, referred to 6 B. & C.; 2 B. & C. 149.

ROBINSON, C. J., delivered the judgment of the court.

McMullen was not a satisfactory witness, certainly; for it may have seemed doubtful to the jury whether this note, given twenty years ago, for a small sum of money (and the interest more than equalled the principal), had not been assigned by the witness just before this action in order to enable him to support a recovery by his own testimony, when otherwise he could not recover.

The parties, it appeared, had been both living in this country during the many years the note had been lying in the payee's hands—still he was a competent witness, and could not be rejected.—2 Camp. 332.

But the learned judge gave his evidence to the jury with such remarks as, we must suppose, induced them to dismiss it wholly from their consideration, on the ground that he had not identified the note—as if that were a legal defect in the evidence, whatever the jury might otherwise think of the evidence.

We think it was not defective to the extent and for the reason the judge apprehended; because, though the witness could not read the note when under examination, for reasons which he gave, whether truly or not, yet it being proved positively by Defoe, an unimpeached witness, that the signature was the defendant's, we cannot doubt that there was such a note between the parties; and that being so, identity was to be presumed when McMullen spoke of the promise to pay this, for there was no allegation, nor suggestion, nor any reason to suppose there was or had been any other note, to which the late promise to pay could be meant to apply.

We think, as the verdict seemed to have been rendered under a misapprehension in this respect, there ought to have been a new trial granted without costs.

We therefore reverse the order made below discharging the rule for a new trial, and direct that there be a new trial without costs.

*Per Cur.*—Order below reversed—new trial ordered, without costs.

---

#### RITCHEY v. THE BANK OF MONTREAL.

The plaintiff declares in debt, for £1000, upon three counts, £500, work done, £100, money paid, and £400, account stated; which said sums are to be respectively paid on request.

The defendant pleads that before any of these causes of action accrued, by an agreement made between them under seal, of which they make profert, the plaintiff agreed to build a house for them, according to certain specifications—that it was stipulated, in that agreement, that any extra work in addition to the specifications should be done under the written instructions and superin-



tendence of their architect, and should be valued by him, and be paid for according to his estimate—that certain extra work was done by the plaintiff, under the direction of their architect, which was valued by him as the agreement provided—that “such extra work is the cause of action *in the declaration alleged, and for which this action is brought*”; that it was duly valued by the architect, at £355 5s. 2d., and that before this action was brought, they paid to the plaintiff the said sum of £355 5s. 2d., in full “satisfaction and discharge of the said extra work, and of all damages and demands in respect thereof; being the said causes of action in the said declaration mentioned.” Demurrer to plea, that it does in effect amount to a less sum being pleaded in satisfaction of a greater. *Held*, plea bad, on the exception taken.

Debt for £1000.

1st count, £500, work done and materials.

2nd count, £100, money paid to defendants' use.

3rd count, £400, account stated.—Conclusion, “which said several sums of money were to be respectively paid by the defendants to plaintiff on request, whereby and by reason of the non-payment thereof, an action hath accrued to plaintiff, to demand and have from the defendants, the said *several* moneys respectively, amounting to the sum of £1000. Yet defendants have not paid the said sum above demanded, (£1000) or any part thereof, to the plaintiff's damage of £10, and therefore he brings his suit.”

Pleas—1st. *Nunquam indebitatus*.

2nd. Payment of £400 in satisfaction and discharge, and acceptance of that amount by plaintiff.

3rd. “That before the accruing of *any* of the causes of action in the declaration mentioned, to wit, on the 7th November, 1845, by certain articles of agreement, made between the plaintiff and defendants, under seal of plaintiff, it was agreed that plaintiff should erect, build and finish the *erection and building* therein mentioned, and should perform and execute the matters and things mentioned in the specifications thereto annexed, and the plans, elevations, sections, drawings and particulars therein mentioned, or referred to, to the satisfaction and under the direction of the architect to be appointed by defendants, and that defendants should pay to the plaintiff therefor the sum of £2983. That in case of any addition to, or omission from, or any alteration in, or deviation from the said drawing and specification, in any part of the said work, by the orders of defendants or their architect, the same should not make void or impeach the contract, but the value thereof should be ascertained by the architect in charge, and such value, when ascertained by him, should be added to, or deducted from, the said sum of £2983, as the case might be, and the decision of the architect to be final; all instructions for any additional work, or omissions or alterations in the said works, to be received by plaintiff from the architect in charge only in writing under his hand; no extra work to be allowed for in any case, unless by the written directions of the architect, and in all cases of dispute as to quantity or price, his decision to be final and conclusive. The defendants then alleged that Kivas Tully was appointed architect; that plaintiff did erect the said building, and with the extra works, alterations and deviations *thereinafter* mentioned, according to the said agreement, specification and plans, and that defendants paid to plaintiff, and plaintiff accepted on the 1st January, 1847, and before the commencement of this suit, the said sum of £2983, in full satisfaction and discharge of the

said sum so mentioned as the contract price ; and further, that after the making of the contract, and before the commencement of the action, in addition to the sum of £2983, the contract price, certain *alterations* and *deviations* were made, and *extra work done* by the plaintiff for defendants, by the orders of Kivas Tully, the architect in charge, as provided for by the said articles, &c. ; “and that the said extra work, alterations and “deviations are the *causes* of action, by the plaintiff in his declaration “alleged, and for which this action is brought;” and that before the commencement of this suit, the said extra work, deviations and alterations, were duly valued and appraised by the said Kivas Tully, the said architect in charge, at the sum of £355 5s. 2d., over and above the said contract price, according to and as provided by the said articles of agreement, of all which plaintiff had notice ; and that defendants afterwards, and before the commencement of this suit, to wit, 1st January, 1847, paid to plaintiff, and plaintiff accepted from defendants, the said sum of £355 5s. 2d., in full satisfaction and discharge of the said extra work, deviations and alterations, and of all damages and demands in respect thereof, “being the said *causes* of action in the declaration mentioned”.

The plaintiff took issue on the two first pleas, and demurred to the third, and assigned for cause that the defendant endeavored to shew satisfaction of a larger sum, by the payment of £355 5s. 2d.

*P. M. Vankoughnet*, for the demurrer.—The plea is bad, as in effect attempting to plead a smaller sum in satisfaction of a greater, viz. £355 in satisfaction and discharge of £1000, the whole amount claimed upon the three several counts of the declaration. The defendants might have denied that the plaintiff had any cause of action, except for work and labour, &c., to the amount of £355, and then pleaded payment of that sum ; or perhaps they might have pleaded *munquam indebted* to the whole declaration, the contract being express and special, and not implied ; but it is not open to them to reduce the plaintiff's three several alleged causes of action, or heads of claim, to one, averring that the three constituted but one demand, and then to plead payment and satisfaction as to the whole declaration by the payment of a sum far less than the sum claimed in the declaration amounted to.—5 M. & W. 289 ; 7 A. & E. 164 ; 4 A. & E. 262 ; 3 Q. B. R. 922 ; 4 Q. B. R. 213 ; 6 A. & E. 726 ; 1 Q. B. R. 77 ; 10 A. & E. 121 ; 4 M. & W. 312.

*J. H. Hagarty*, contra.—The pleadings to be found in the books upon awards pleaded to actions, and payment in discharge of the sum awarded, such as 5s. in satisfaction of a claim of 1000*l.*, are precisely similar to the present plea. As a general principle, no doubt, a smaller sum cannot be pleaded in satisfaction of a greater ; but there are exceptions to this rule, and the plea in this case, as framed, is within the exception. The whole effect of the plea is, to deny that the plaintiff ever had a cause of action greater than 355*l.*, and to assert that all the causes of action declared on, and spread over the three counts in the declaration, are one and the same ; that they are intended to cover, and do in fact only cover, a claim for certain extra work done by the plaintiff for the defendants, which said extra work was valued in the mode agreed upon between the parties at 355*l.*, which said sum was paid by the defendant, and accepted by the plaintiff, in full discharge of said extra work. The

plea is a good defence to the action, and correct in form.—3 Chitty's Pl. 793; Billings on Award, 293; 2 C. & J. 47; 1 Y. & J. 19; 1 C. M. & R. 649; Smith's L. C. 148; Eng. Jurist, Editorial article, 28th November, 1846; 15 M. & W. 23; 3 Q. B. R. 922; 4 A. & E. 262; 5 M. & W. 468; 2 Saund. 3.

ROBINSON, C. J.—The plaintiff sues the defendants in an action of debt on simple contract, complaining that they owe him £1000. He claims £500 as being due to him for work and labour and materials found—£100 for money paid by him to the defendants' use, and £400 upon an account stated; which said several sums he alleges were to be respectively paid to him upon request.

The defendants set up as a defence in their third plea, that before any of these causes of action accrued, by an agreement made between them, under seal, of which they make profert, the plaintiff agreed to build a house for them according to certain specifications; that it was stipulated in that agreement that any extra work, in addition to the specifications, should be done under the written instructions and superintendence of their architect, and should be valued by him, and be paid for according to his estimate; that certain extra work was done by the plaintiff under the direction of their architect, which was valued by him, as the agreement provided; that "such extra work is the cause of action *in the declaration alleged, and for which this action is brought*;" that it was duly valued by the architect at 355*l.* 5*s.* 2*d.*; and that before this action was brought they paid to the plaintiff the said sum of 355*l.* 5*s.* 2*d.*, in full "satisfaction and discharge of the said extra work, and of all damages and demands in respect thereof, being the said causes of action in the said declaration mentioned.

This plea is demurred to. It seems to amount in effect to "*nunquam indebitatus*," for it alleges that there never was any demand for which debt on simple contract would lie, the debt being only for work done under a special contract: so that the defendants might safely have denied that they were ever indebted in manner and form, &c.

They have pleaded specially, however; and the objection taken to the plea upon general demurrer is, that it pleads the payment of 355*l.* due for work and labour as satisfaction and discharge of 1000*l.*, part of it claimed as for money paid, and part on an account stated, instead of denying, as it ought to have done, that the plaintiff had any cause of action except for work and labour to the amount of 355*l.*, and pleading payment of that sum.

I am of opinion that the objection is entitled to prevail, for it is not allowed in pleading that the defendant shall confine the plaintiff's alleged distinct causes of action to one, and thus profess to answer these several claims, upon different causes of action, amounting together to 1000*l.*, by averring that they constituted one demand, and that they have satisfied them all by paying less than one half of the amount claimed; 5 Dow. P. C. 217, 91; 4 Dow. 488; 3 Q. B. R.; 5 M. & W. 468; 6 Ad. & Ell. 726; 1 M. & P. 102.

The correct way of pleading, in such a case as the present, is pointed out by Mr. Justice Holroyd, in *Thomas v. Mathews*, 2 B. & C. 481, and according to his statement of the principle of pleading, the defendants should have pleaded, as to all but the 355*l.* &c. parcel of the money in the



first count mentioned, *nunquam indebitatus*, and as to that sum, payment and satisfaction. But under the particular facts of this case, when no legal demand for work and labour could have accrued to the plaintiff, according to the defendants' statement, except under a special contract under seal, the more proper course perhaps would have been, to have pleaded *nunquam indebitatus*, to the whole declaration. But that may require to be more carefully considered.

It is not stated in this plea, that after the work and labour was performed, the parties stated an account respecting it, which was the same account mentioned in the third count, nor is it in any manner explained, how the second count for money paid, can be identical with the demand for work and labour and materials.

I do not say that the defendant could have framed a plea free from exceptions, by introducing such averments, but without them, there is I think a manifest repugnancy.

Work, alterations and deviations, "cannot in fact be the causes of action by the plaintiff alleged," because they are neither money paid, nor do they constitute of themselves any "account stated."

How can 355*l.* due for extra work, be the same cause of action as 1000*l.*, due upon three distinct heads of claim.

If it could have been averred, that the plaintiff had made claims, such as he declared upon, which had upon a reference to arbitration, been made the subject of one award of a sum to be paid in satisfaction of them all; then we should have had the ordinary course of pleading upon an award, and there would have been no apparent inconsistency.

The defendants' counsel, upon the argument, referred to pleas setting up an award in bar of an action as analogous, but it is evident upon consideration that the defence there is of a different nature, and pleaded under different circumstances.

If an account of the extra work in this case, had in fact been stated between the parties, after it had been performed, then it would have created a new and distinct cause of action, and it might have given a claim to either more or less than the architect's estimate.

Such an account could not have been stated, before the agreement was made, because the work was yet to be done; the first and third counts, then, could not possibly have been for the same causes of action, and the sums are different. I am of opinion, that the plaintiff is entitled to judgment on the demurrer.

MACAULAY, J.—The case of *Down v. Hatcher et ux.*, 10 A. & E. 121, shews that the objection noted, is a good ground of general demurrer, and although the objection arising upon the pleadings, is not expressly, that payment of a smaller sum has been pleaded in satisfaction of a greater, still it is in effect equivalent thereto.

The plea professes to answer a debt of 1000*l.*, by payment of 355*l.* That the defendants were indebted to the plaintiff in 1000*l.*, on the causes of action stated by him, is not denied, unless argumentatively, by means of the averment, that the extra work, alterations and deviations, mentioned in the plea, are the causes of action stated in the declaration, including materials, money paid and account stated.

The plea therefore in effect is a plea of payment of a less sum in satisfaction of a greater, for it admits and answers the whole debt as once



an existing debt, and shews it satisfied by payment of 355*l.*, under a special sealed agreement, the effect of which agreement is to shew, that the debt never exceeded 355*l.*

Now admitting that the identity of the causes of action with the extra work could be averred, it is not (especially in relation to the account stated,) sufficiently done, as shewn by the case of *Rayner v. Wright*, 3 Q. B. 922.

There the objection was taken by special demurrer, but the identity was alleged in terms more pointed than in the case before us. The defendant as to the first and last counts said, that the monies mentioned in those counts were claimed for and in respect of work previously done, &c, and then alleges the incompetency of the plaintiff to do such work, (viz. as a broker &c.,) as a defence to the whole demand. This plea admits and answers the whole demand, and it turned upon the sufficiency of the averment of identity.—*Mee v. Tomlinson*, 4 A. & E. 262, and other cases there referred to.

But here the objection goes much further, and amounts to this, that to a count for 400*l.*, found due upon an account stated, the defendants not denying, but admitting such account stated, plead that certain extra work, &c. was done by the plaintiff under a sealed agreement, valued at 355*l.*, which had been paid, &c., which work was the cause of action in that count alleged.

It is true, the account may have been stated of and concerning such extra work, but the cause of action is the account stated; and if after the work was done, the defendants did account with the plaintiff in relation thereto, and admit (it may have been under the corporate seal) that 400*l.* was due, it would be no defence to the whole demand, that their architect had, under the agreement, valued the work at 355*l.* only, which the plaintiff received in satisfaction of a greater demand found to be due to him upon an account stated, &c.

The plea should have been limited to 355*l.*, as to the extra work, and *nil debet* to the residue of the plaintiff's demand; as it is, it appears to me bad on general demurrer.

*McLEAN, J.*—The plaintiff claims 1000*l.* on three several counts; and the defendants, by their third plea, try to confine the claim to *one* cause of action, by the statement, that the “extra work, alterations and deviations are the causes of *action* by the plaintiff in his declaration alleged, and for which this action is brought;” and they say, that as to that cause of action, they have paid to plaintiff 355*l.* 5*s.* 2*d.*, in full satisfaction and discharge of the same.

If plaintiff were to take issue as to the *payment* of this sum of 355*l.* 5*s.* 2*d.*, he would be precluded from recovering a large amount, if the defendants could make out that the extra work, alterations and deviations amounted only to that sum, according to the valuation of the architect, though in fact he might have a claim to a much larger amount under the count on an account stated, or that for money paid to the defendants' use.

He would not on such an issue be at liberty to shew, that his demand was for any thing but the extra work, alterations and deviations, and might thus be deprived of his principal cause of action.

The defendants had no right to assume, that the account stated

or the money paid, had any connection whatever with the extra work, &c.; and should not by this plea have attempted to limit the plaintiff's right of recovery on any of his counts, as if all were necessarily connected and forming but one cause of action.

The plaintiff declares for 400*l.* on an account stated; and the defendants, to this, and to the count for 100*l.* money paid, and 500*l.*, for work and materials, plead payment of 355*l.* 5*s.* 2*d.*, in full satisfaction and discharge. The case of *Down v. Hatcher et ux.*, 10 A. & E. 125, and other cases, shew that payment of a smaller sum, in *satisfaction and discharge* of a larger, cannot be pleaded in bar of plaintiff's right; and the case of *Rayner v. Wright*, 3 A. & E. N. S., or Q. B. R. 922, is quite in point to shew, that the defendants cannot couple together several counts, which are ostensibly for distinct causes of action, and treat them in their answer as if all related to the same subject matter.

On these grounds therefore, I concur in the opinion, that judgment on the demurrer in this case, must be for the plaintiff.

*Per Cur.*—Judgment for the plaintiff, on demurrer.

#### PRINDLE V. McCAN ET AL.

Where to a bond conditioned that the defendant should "*well and truly convey* in fee simple to the plaintiff, his heirs and assigns, for ever," the defendant pleads that "he did make, seal and execute a conveyance in fee simple to the plaintiff: *Held*, on demurrer, plea bad, being no answer to the condition. The plea of payment of a sum of money in satisfaction and discharge of a bond conditioned to do a collateral thing is bad, unless it avers that the payment was made after the time for performance was past, and after a breach had been incurred.

A loan of money cannot be pleaded in satisfaction and discharge of a bond and condition.

Where an obligor binds himself "well and truly to convey the land," he must himself tender the conveyance executed to the obligee.

Debt on bond, conditioned that the defendant McCAN should "*well and truly convey in fee simple* to the plaintiff, his heirs and assigns, "for ever," the land specified, within four years from the date of the bond.

The defendants pleaded, first, that McCAN did within the four years make, seal and *execute a conveyance* in fee simple, to the plaintiff, of the said land.

Demurrer to 1st plea: That it does not properly answer the declaration, for while the declaration alleges that John McCAN should well and truly convey the land, in manner and form therein mentioned, to the plaintiff, and that he did not well and truly convey the same land as aforesaid to the plaintiff. The plea simply says, that John McCAN made, sealed and executed a conveyance in fee simple to the plaintiff, his heirs and assigns, of the same land, without stating that he well and truly conveyed the land in manner aforesaid by the conveyance; that the conveyance referred to by the defendant should have been set out by proper and apt words, that the court might be able to judge whether by that conveyance John McCAN had well and truly conveyed the same land to the plaintiff, in manner aforesaid.

Second plea.—That after the making of the said writing obligatory, &c.,

the defendant John McCan paid to the plaintiff a large sum of money, to wit, the sum of 4*l.* 14*s.* 8*d.*, and then lent and advanced to the plaintiff for the period of three years from the day and year last aforesaid the sum of 16*l.* 8*s.* 10*d.*, in full satisfaction and discharge of the said writing obligatory and of the condition thereof, and of all damages by the plaintiff sustained by the breach thereof; and the said plaintiff then accepted and received the said sum of 4*l.* 14*s.* 8*d.*, and the said loan of the said sum of 16*l.* 8*s.* 10*d.*, from John McCan, for the said period, in full satisfaction and discharge of the said writing obligatory and of the condition thereof, and of all expenses and damages to the said plaintiff sustained by the breach thereof; and this the defendants are ready to verify, &c.

Demurrer to second plea: That it sets up the payment of a smaller sum in satisfaction of a greater; that it sets up a loan of money, which can be no satisfaction; that it sets up an accord, without shewing it to have been by seal; that it sets up an accord for the non-performance of a collateral act; that it is pleaded as well to the condition as to the obligation, whereas it appears the condition was then forfeited.

Exception to declaration: That it did not contain any averment that the plaintiff tendered to said McCan, for execution, a deed or conveyance, or writing prepared to become a conveyance upon execution by the said McCan.

*A. Wilson*, for the demurrer, relied upon the following authorities:—5 B. & C. 199; 9 M. & W. 829; 1 M. & G. 169; 6 M. & W. 835; Cro. J. 254; Cro. Eliz. 46; 1 Jur. 183; 7 Taunt. 251; 2 Wils. 86; 9 Co. 76; 2 B. & Ad. 328.

*P. M. Vankoughnet*, contra, cited in support of the second plea, 2 Jur. 855; Ld. Raym. 60. He contended that, since the statute for assigning breaches, a plea is good in bar of damages, and need not be in bar of the bond.—15 M. & W.; Cro. Eliz. 428; 11 E. 390; 1 A. & E. 106.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the first plea is bad. The condition of the bond is, that the defendant McCan shall “well and truly convey in fee simple to the plaintiff, his heirs and assigns, for ever,” the land specified, within four years from the date of the bond; and the defendants plead that McCan did within the four years make, seal and execute a conveyance in fee simple, to the plaintiff, of the said land.

Now well and truly conveying land to a person, is a very different thing from “making, sealing and executing a conveyance of the land.”

If the former act be done, the estate must necessarily pass; but the latter act may be done without any estate passing—for the obligor may have gone through the form of executing a conveyance of land to which he has no title whatever, and which therefore he would not and could not convey by the deed, though he should go through the ceremony of signing it; and the defect is more evident here, when the plaintiff has expressly averred that the defendant has no title, and could not convey.

The second plea is also undoubtedly insufficient. It pleads the payment of a sum of money in satisfaction and discharge of a bond conditioned to do a collateral thing, without averring that it was after the time for performance was past, and that a breach had been incurred, which might have made such a plea good in satisfaction of the damages.



Here it does not sufficiently appear that it is not set up as an accord and satisfaction, in discharge of a contract under seal, before breach.

Then it is absurd to plead a loan of money in satisfaction and discharge of a bond and condition, as is done here.

The declaration was excepted to on the argument, because it contained no averment that the plaintiff had prepared and tendered a deed for execution ; but that was not necessary to be averred, for it was for the defendants to save themselves from the penalty of the bond by fulfilling the condition.

They undertook that McCan should well and truly convey, within a certain time, without any qualification which can be relied upon for throwing it upon the other party to devise a conveyance, and tender it for execution.

This is not a mere question of who shall bear the expense of the deeds, or who shall prepare them, upon a contract of an ordinary kind to sell real estate.

The obligors here have bound themselves that McCan shall convey the land ; and if he either cannot do so, or will not do so, by the day named, they have lost the benefit of the condition.—Com. Dig., Condition H.

*Per Cur.*—Judgment for the plaintiff on demurrer.

---

ACHESON V. MCKENZIE.

It is no ground of demurrer, that a declaration upon a bill or note does not conform to the new rules, if it be otherwise good in itself.

It is not necessary, in declaring upon a bill or note, after stating the defendant's promise, to aver *the defendant's legal liability* to pay the bill or note to the plaintiff.

Appeal from the District Court of the District of Johnstown.

This was an action brought by the holder of a note payable to bearer, against the maker.

The declaration set out the note, the transfer to the plaintiff, and then the promise to plaintiff, averring the *defendant's liability to pay* the amount of the note to the plaintiff.

Upon a special demurrer for this omission, the judge of the District Court held the demurrer to be good.

This decision was appealed from.

*P. M. Vankoughnet*, for the appeal.

*J. H. Hagarty*, contra.

ROBINSON, C. J., delivered the judgment of the court.

It seems to have been erroneously supposed, that everything inserted in the form of declaring on notes and bills, given by our new rules, must be inserted, whether necessary or not, upon principles of pleading, merely because the form contains it ; but this is clearly not so, as we have already determined.

The same idea was at first entertained in England, but the court declared that it was no ground of demurrer that the declaration did not conform to the new rule, if it were otherwise good in itself.

The adopting unnecessarily a more extended form of declaring than is sanctioned by the rule, may be made the ground of a motion as regards costs ; but otherwise the rule merely sanctions declarations in those



forms—it does not compel a close adherence in all points, whether material or immaterial.

Here the statement of a legal liability was immaterial, after stating the promise.

In England there is a redundancy in the form prescribed, but of another kind. Instead of averring that the defendant became liable to pay—which our form does, and the form in the English rule does not—it states that the defendant promised to pay, which our form does not, and which the English form does, but unnecessarily, as has been remarked by Mr. Chitty, because the note set out is in itself an express promise, and therefore the legal or implied promise need not be stated.

We reverse the judgement in favour of defendant on demurrer, and direct that it be given in favour of the plaintiff.

*Per Cur.*—Judgment below, in favour of the defendant on demurrer, reversed; and judgment in favour of the plaintiff on demurrer directed to be given.

#### IRELAND V. WAGSTAFF ET AL.

Where a plaintiff commences an action, and pending the proceedings becomes a bankrupt, he may, under our Bankrupt Act, 7 Vic. ch. 10, secs. 31 & 32, continue the suit in his own name, unless the *assignees* intervene and *desire* to be made plaintiffs in his stead.

Assumpsit on two bills of exchange.

Plea: That plaintiff became a bankrupt after the commencement of this suit, and that James Samuel was duly chosen and appointed assignee of the bankrupt estate of plaintiff; and therefore plaintiff could not further prosecute this suit.

Replication: That this action was continued and prosecuted with the assent of James Samuel, as assignee, and for his benefit, as assignee, and for no other purpose.

Special demurrer to this replication, on the ground that it was not shewn with whom James Samuel agreed and consented that this action should be prosecuted in the plaintiff's name, for his (Samuel's) benefit, as assignee; and, further, that the assignee should have intervened and caused his own name to be substituted for that of plaintiff; whereas, by the replication, plaintiff attempted to shew that, notwithstanding plaintiff's bankruptcy, and the issuing a commission and appointment of an assignee after this action was commenced, the plaintiff might still continue to prosecute this action by the consent of the assignee.

The plaintiff objected, on general demurrer, that the defendant's plea was bad, inasmuch as it did not allege that the assignee, under the commission of bankruptcy, had interfered or required the defendants to pay him the amount of the bills declared on.

*Boomer*, of Niagara, for the demurrer, referred to 15 E. 622.

*R. O. Duggan*, of Hamilton, contra, relied upon 5 Q. B. R. 965; 7 E. R. 53; 1 B. & Ad. 462; 3 T. R. 438.

ROBINSON, C. J.—The English statute 1 Jac. 1, chap. 15, sec. 13, expressly provides that after the assignment the bankrupt shall not have power to recover any debts that were due to him; and *Kinnear v. Tarrapt*, 15 E. R. 622, decides that, under such a provision, the defendant,

who is sued for a debt due to a plaintiff who becomes bankrupt pending the action, may, so long as he has a day in court, plead the bankruptcy in bar.

The statute 6 Geo. 4, ch. 16, sec. 63, was as express as the statute of James on this point; for it enacted that "after the assignment neither the bankrupt, nor any person claiming through or under him, shall have power to recover debts due to the bankrupt; but that the assignees shall have remedy to recover the same in their own names."

Our statute 7 Vic. ch. 10, secs. 31-32, declares that "the instrument of assignment shall vest in the assignees all debts due to the bankrupt, or to any person in trust for him;" but it contains no such provision as the English acts contain, that the bankrupt shall have no power to recover debts after the assignment. It merely provides "that the assignees shall have the like remedy to recover all the debts in their own names as the bankrupt might have had, if no commission had issued against him." And it contains, besides, this provision, which forms no part of the English statutes, "that, if at the date of the commission any action shall be pending in the name of the bankrupt, for the recovery of any debt which might or ought to pass to the assignees, such assignees, if they desire it, shall be admitted to intervene and become a party to and substitute their names for that of the bankrupt; and thenceforth, in their own names, to prosecute in like manner and to like effect as if the same had been originally commenced by them, as such assignees."

The 32nd clause provides that "the assignees *shall collect* all the debts of the bankrupt, and for that purpose, bring *all necessary actions* in their own names, as such assignees."

The question is, whether upon the provisions in our Bankruptcy Acts, the defendant in any suit brought against him by the bankrupt, before his bankruptcy, can, after the bankruptcy, plead the assignment in bar of the further maintenance of the action, as he could do in England; and whether he can defend himself by such plea, without shewing that the assignee has applied or desired to intervene, by substituting his name for that of the bankrupt.

In other words, what is the effect of the bankruptcy upon the action pending, if the assignee does nothing in the matter? Is it not, under our statute, merely left to him to avail himself or not of the right to carry on the suit in his own name, or to forbear doing so, as he may think proper?—As in the cases of *Drayton et al. v. Dale*, 2 B. & C. 293; *Ashley v. Kell*, 2 Str. 1207; *Webb v. Fox*, 7 T. R. 391; *Hull v. Pickersgill*, 3 Moore, 612; with respect to debts accruing to the bankrupt after his bankruptcy; and the additional fact is to be taken into consideration in this case, which the replication sets forth, and which is admitted by the demurrer, that the assignee has consented and agreed that this suit shall be continued in the name of the plaintiff, for the benefit of him, the assignee, and is now prosecuted for his benefit, and for no other purpose.

The cases of *Coles v. Barrow*, 4 Taunt. 759; *Kitchen v. Bartsch*, 7 E. R. 53; *Webb v. Ware*, 7 T. R. 296; *Fowler v. Down*, 1 B. & P. 44; proceed chiefly on the distinction between debts due to the bankrupt before or after the assignment, or his interest in goods acquired by him

before or after the assignment; but when it is considered that the assignees, under the bankrupt laws then in force in England, were admitted to have an equal property in debts and goods belonging to the bankrupt before or after the assignment, I cannot but consider that the language and decision of the courts in those and similar cases, so far as they tend to support an action proceeding in the name of the bankrupt, unless where the assignees had interfered and desired to prevent it, are entitled to much weight in determining this case; and much more, where the fact is, as he the plaintiff avers here, that he, the bankrupt, is carrying on the suit with their assent, and for their benefit.

When once it is admitted, as it is fully in *Kitchen v. Bartsch* and other cases, that after-acquired goods and claims stand upon the same footing as those which the bankrupt held at the time of the bankruptcy, and passed to his assignees without any new assignment, then the objection, that the right and interest of the assignees must supersede the former right of the bankrupt to sue in his own name, must, as a mere legal and technical ground, apply in both cases alike.

As to any inconvenience that persons sued by the bankrupt might be put to, in regard to their costs, in case of a groundless action, that has been urged often without effect in England; for the inconvenience may be met, and is met there, by requiring the assignees to give security for costs.

Then, in *Coles v. Barrow*, 4 Taunt. 759, Mansfield, C. J., says—"When the bankrupt sues for the benefit of the assignees, then the court will compel security;" and in *Kitchen v. Bartsch*, Mr. Justice LeBlanc observes—"All the cases admit that the superior title of the assignees must prevail, when they come forward. When interlocutory judgment has been recovered by one who afterwards becomes bankrupt, the court has always listened to the application of the assignees to proceed with the suit in the bankrupt's name; so, on the other hand, in applications for costs, where one action has been brought by the assignees for their own benefit, in the bankrupt's name, the court has required them to give security for the costs." Mr. Tidd, in his *Practice*, confirms this.

Now, of course, where the bankrupt had got the length of interlocutory judgment in his suit before his bankruptcy, he must have been suing for a debt due to him before the assignment, which brings it precisely to the present case.

On a review of the English cases, I should be unable to decide that the bankrupt might not proceed as trustee for the assignees in this action, with their express consent and for their benefit, as is here pleaded.

But there is, besides, something peculiar in our statute 7 Vic. ch. 10, sec. 31, which seems much to favour such a decision; for it provides, "that, if the bankrupt shall die after the date of the commission, all proceedings shall still be continued in the like manner as if he had lived."

This, it seems to me, would have been an unnecessary provision, unless the legislature had contemplated that at the time of his death the action might be proceeding in his name; in which case only the suit would abate, unless that inconvenience were guarded against.

Upon the best opinion I can form, I consider the plaintiff is entitled to judgment on this demurrer.



I think the fact of the assignee consenting to the action is in point of form sufficiently averred; and the peculiar nature of our statute, which allows the assignees a discretion to intervene or not, strengthens my opinion.

I refer, also, to *Waugh v. Austen*, 3 T. R. 438, and *Guinness v. Carroll*, 1 B. & Ad. 462, and to 1 Saunderson's Reports, 72 (c), as supporting the continuance of the action in the bankrupt's name.

McLEAN, J.—The act of this province 7 Vic. ch. 10, after providing for the mode of proceeding in cases of bankruptcy, and the appointment of assignees, by the 31st section vests in the assignees duly appointed to any estate all the property of the bankrupt, real and personal, which he could have lawfully sold, assigned or conveyed, or which might have been taken in execution, and all debts due to the bankrupt or to any person in trust for him or to his use, all liens and securities therefor, and all the bankrupt's rights of action for any goods or estate, real or personal, and all his rights of redeeming any such goods or estate; and the 32nd clause declares that "the assignees shall demand and receive "from the sheriff and all other persons all the estate and property, of "whatever description, in his or their possession; and they shall collect "all the debts and effects of the bankrupt, and for that purpose bring all "necessary actions in their own names, as such assignees;" and it gives to the assignees full power over the estate and effects of the bankrupt.

After their appointment and acceptance of office, the assignees appear to be the only persons who can sue for or collect the debts of a bankrupt, and all actions are required to be brought by them in their own names; but where suits have been instituted, to which the bankrupt is a party, for the recovery of any debt or other thing which might or ought to pass to the assignees, the assignees, by the 31st section, "*if they desire it*," shall be admitted to intervene and become a party, and to substitute "*their* names for that of the bankrupt, and thenceforth in their own "names to prosecute in like manner and to the like effect as if the "same had been originally commenced by them, as such assignees;" but it is not imperative on the trustees to intervene in such actions. They have a right to do so, *if they desire it*; but if they do not desire it, the inference to be drawn from the wording of the statute is, that the action must proceed in the name of the bankrupt, as it was originally commenced; there is no provision that the action shall cease, though the cause of action and whatever may be recovered becomes vested in the assignees from the time of their being authorized to act.

That part of the 32nd clause of the statute which declares that the assignees "shall collect all the debts and effects of the bankrupt, and "for that purpose bring all necessary actions in their own names, as such "assignees," is not in any way inconsistent with the continuance of any action which had been instituted previously in the name of the bankrupt.

The assignees are only required to bring all necessary actions; but where such actions have already been brought, they may, if they desire it, intervene at any stage of the proceedings, or allow the suits to proceed in the bankrupt's name for the benefit of the estate.

To a debtor, it must be immaterial in whose name a suit may be brought or continued, provided he can only be called upon once for the amount of his debt.



It may be supposed to be attended with hardship, that a defendant in a suit brought by a bankrupt, and continued in his name by the assignee, cannot recover his costs if he succeeds in the action ; but relief in such case can be obtained by an application, while the cause is proceeding, to stay such proceeding till the assignees intervene or give security for costs.

When a debt is owing, for which a suit has been brought by a bankrupt, the debtor can always discharge himself by paying the debt to the assignees ; and he can always ascertain, without much difficulty, whether the suit is proceeding under the sanction and for the benefit of the assignees.

I do not, therefore, see that any injury is likely to arise by allowing suits instituted previous to bankruptcy to be continued in the name of the bankrupt, for the benefit of his estate ; but, under any circumstances, the statute appears to sanction such a proceeding, and we cannot interfere with it in this case on the pleadings before us.

If the defendants had pleaded the bankruptcy of plaintiff, and that they had been required by the assignee of his estate to pay him the amount of the bills declared on, the plea, as in the case of *Kitchen v. Bartsch*, 7 East. 53, might be good ; but here no such demand is set up.

In the case of *Wagh v. Austen*, 3 T. R. 437, where execution was sued out in the name of the bankrupt, the court refused to set aside the proceedings ; and the court said that the bankruptcy of the plaintiff did not *abate* the suit, and that they had in several instances permitted the assignees to continue a suit commenced by a bankrupt in his name.

In a subsequent case (*Kinnear v. Tarrant et al.*, 15 East. 622), the court decided that the plaintiff, a bankrupt, who had become so after the issuing of a *scire facias* against bail, could not have execution against the bail on their recognizance.

In this case, it may be necessary for the assignee to intervene before execution, or to proceed by *scire facias* ; but so far as the proceedings have gone, they are strictly within the meaning of the statute.

MACAULAY, J., concurred.

*Per Cur.*—Judgment for plaintiff on demurrer.

#### GEDDES V. ROGERS.

*Indorsee v. the Indorser of a note.*—Upon the issue as to whether the claim upon this note was or was not included in a certain composition, alleged to have been entered into between the defendant and his creditors ; the following memorandum in writing, given by the agent of the creditors to the defendant, was put in evidence : “ I hereby acknowledge to have received, as agent for the creditors of Mr. John Rogers, whose names are specified in the foregoing schedule of creditors, the promissory notes, as stated in the foregoing schedule, to be applied, &c. And I hereby discharge the said John Rogers from any further liability for or on account of the said claims, save and except the claim of John Torrance & Co., and C. Geddes ; the same not yet having been ascertained, by reason of an equitable security on certain real property of said John Rogers ; but I have taken security on said notes for 7s. 6d. per pound, on the whole of said claim of J. Torrance & Co., which is to be applied in liquidation of the same, leaving any balance, to be stated in connection with the property, and any balance that may be coming to Mr. Rogers, after paying the said composition, to be returned to him from the proceeds of the said notes ;” and he added these words “ I have received the within notes

"on account of the within mentioned claims; and I do hereby discharge Mr. Rogers in full of all the Montreal claims, *excepting* J. Torrance & Co., and Geddes, collateral claims, and in accordance with my letter to A. Hamilton, of August last:" this was signed 23rd October, 1845.

*Held, per Cur.*—That the above written memorandum so clearly excepted the plaintiff's claim upon this note from the composition, that parol evidence with respect to its meaning was inadmissible.

*Assumpsit.*—The plaintiff sued on a promissory note, made 24th February, 1845, by one Simpson, for 29*l.* 12*s.* 3*d.*, payable to the defendant, or his order, in three months, and endorsed by the defendant to the plaintiff.

The defendant pleaded, among other pleas, that upon a commission of bankruptcy having issued against him, he compounded with his creditors, including this plaintiff; and upon his agreeing to pay a certain composition, which was accepted by them, they released him from all debts due to them; that the debt due by him on this note, was included among those for which he compounded; and that he was in consequence discharged from liability upon it.

The plaintiff replied, that the claim upon this note was not included in the composition.

The written agreement of composition, upon which the defendant relied, was produced in evidence. It was signed by the agent for the creditors, who were named in a schedule prefixed to it, and the debt due to each was also specified.

The schedule included the name of this plaintiff, as a creditor for 1498*l.* 0*s.* 10*d.*, with many others, the debts amounting to above 8000*l.*

The composition was to be made at 7*s.* 6*d.* in the pound.

On the same paper, was a list of notes held by Rogers, the defendant, and placed in the agent's hands to be collected, and the proceeds applied in paying the creditors, according to the rate of composition.

At the foot of the paper, the agent made this memorandum:—"I hereby acknowledge to have received, as agent for the creditors of Mr. John Rogers, whose names are specified in the foregoing schedule of creditors, the promissory notes as stated in the foregoing schedule, to be applied, &c.; and I hereby discharge the said John Rogers from any further liability, for or on account of the said claims, save and except the claim of John Torrance & Co., and C. Geddes; the same not yet having been ascertained, by reason of an equitable security on certain real property of said John Rogers; but I have taken security on said notes for 7*s.* 6*d.* per pound on the whole of said claim of John Torrance & Co., which is to be applied in liquidation of the same, leaving any balance to be stated in connection with the property, and any balance that may be coming to Mr. Rogers, after paying the composition, to be returned to him from the proceeds of the said notes;" and he added these words "I have received the within notes, on account of the within mentioned claims; and I do hereby discharge Mr. Rogers in full of all the Montreal claims, *excepting* John Torrance & Co., and Geddes, collateral claims, and in accordance with my letter to A. Hamilton, of August last:" this was signed 23rd October, 1845.

The note sued upon fell due 2nd May 1845, it had been indorsed after the plaintiff by several others, and was protested for non-payment to H.

Mittleberger, the last indorsee, this plaintiff being an intermediate indorser.

The agent for the creditors, Mr. Greenshields, was examined on the trial, and swore that the plaintiff's whole claim against the defendant was 1648*l.*, and was reduced to 1498*l.*, as it stood in the schedule, by leaving this and some other small notes out of the claim, from which the defendant was not to be discharged; and upon the understanding, that if the plaintiff should fail in getting payment from the makers, he was still to have his recourse against the defendant, as indorser.

It was left to the jury to say, whether they were satisfied from the evidence that such was in fact the intention, and it was to be referred to the court *in banc*, to determine whether the written instrument ought to receive that, or another construction.

The jury found for the plaintiff, for the note and interest.

*H. Eccles* moved for a new trial, on the ground of misdirection.—What is meant by "the collateral claims," in the memorandum? It does not conclusively appear, that this note was or was not included in these words. Mr. Hamilton, a witness, was called to explain their meaning, on the part of the defendant. The learned judge at the trial rejected his evidence, on the ground that the memorandum was so explicit, as to the note not being included in the deed of composition, that any evidence that could be tendered to give it a different construction, must be held to contradict the memorandum itself. It is submitted, that the memorandum does not clearly express its own meaning, and that the evidence of the witness called to explain it, should not have been refused.

*J. Lukin Robinson*, *contra*.—This note is expressly, and in so many words, excepted from the composition. Nothing can be more positively and distinctly asserted than this fact: the only ground, then, upon which parol evidence could be offered with respect to the memorandum, was to contradict its obvious meaning. This was clearly against the rules of evidence, and the testimony of the witness called for such a purpose was properly rejected.

ROBINSON, C. J., delivered the judgment of the court.

We think it not improbable, that there may have been some confusion in the mind of the agent for the creditors, when he put the claims of Messrs. Torrance & Co. and of this plaintiff on the same footing, at least as to such portion of this plaintiff's claim as he considered this plaintiff to hold a collateral security for on these notes.

Messrs. Torrance and Co., it seems, had collateral security on lands. That security, Mr. Greenshields did not pretend to release, nor would it have been reasonable to make it a condition, that the other parties liable to the plaintiff on these notes now in question should be released; but he perhaps on consideration would have released the defendant from these notes, as well as the other debts to the plaintiff.

But we are bound to form our judgment on the writing itself, and looking only at that, we can express no other opinion than that which the learned judge at the trial expressed, that it does not actually bar any proceeding to recover the note in question from the defendant.

The agent for the creditors only swore, what the writing on the face of it shews, that what he called Geddes's collateral claim upon the defendant, was expressly excepted from the operation of the release.



The collateral claim, it is clear, was no other than the claim against him as indorser of Simpson's note, for which he was not primarily, but secondarily liable; and accordingly the 1498*l.*, from which alone he was released, excluded this and another small note, similarly circumstanced.

The jury also expressly found, that this was intended.

*Per Cur.*—Postea to the plaintiff.

---

#### RUDOLPH v. BERNARD.

A. demises to B. for a certain term; B. during the term absconds, and abandons the property, leaving no one to occupy it; C. finding the place vacant, puts a person in possession, and makes a demise to D.; A. distrains for rent under his lease to B. *Held, per Cur.*—Distress legal.

#### Replevin.

The defendant avowed under distress for rent, due by one Rogers, for a dwelling house, under a demise thereof to him for eight months from 1st September, 1846, at 13*l.* rent, payable monthly, in equal proportions, on the first day of each month, averring that 4*l.* 17*s.* 6*d.* was due for three months' rent, on the 1st January, 1847.

The plaintiff replied first, *non tenuit*, that is, that Rogers the tenant did not hold as averred.

Secondly, no rent in arrear.

It appeared on the trial, that Rogers took the house from the agent of the defendant Bernard, on the terms stated in the avowry; that he entered into possession, and made a small payment on account of rent, but absconded before the second month's rent became due.

While the house was thus abandoned, no person or property being left in it, one Walton placed a person in possession, and some days after made a lease of it to the plaintiff Rudolph, who went in under that demise.

The jury gave a verdict for the plaintiff, and 1*s.* damages, subject to the opinion of the court.

*D. G. Miller*, for the plaintiff, relied upon 2 Moore, 656; 2 Wilson, 375; 6 Taunt. 202; 1 Bing. 360; 9 Bing. 613; Holt's N. P. 489; 5 Bing. 410; 2 Chitty's R. 708.

*J. H. Hagarty*, for the defendant.—The question is simply this, does the fact of a tenant leaving during his demise, give a right to a stranger to enter the premises upon the authority of another stranger shewing no privity with or title paramount to the lessor, and to deprive the lessor of his privilege of distress; he would contend it did not.—Bradley, 78; Cro. Jac. 275, 300.

ROBINSON, C. J. delivered the judgment of the court.

The question raised is, whether this plaintiff can set up as an objection to the right to distrain upon this issue of *non tenuit*, that the defendant's tenant having entered and enjoyed, and paid rent, and afterwards absconded during the term, a third person entered into the deserted premises, not as a mere trespasser, and by privity with no one claiming right, but under the permission of a fourth party, who did claim an interest in the premises, but whose interest was not shewn, between whom and Rogers the tenant, or between whom and the defendant (the landlord), no privity whatever was proved.



No such defence, in our opinion, can be urged against the right to distrain either under the plea of *non tenuit*, or under any other.

The case of *Humphry v. Damion*, Cro. Jac. 300, if it be still law, is clear against it.

In that case, the lessee had been evicted by a stranger; the disseisin continued till the day of payment. The lessor afterwards demanded the rent, and the lessee refused to pay it, and the court said, "The lessor "may either enter upon the land, for the condition broken, or he may "(if he will,) distrain for the rent, for the land leased shall be subject "to those lawful remedies, which the lessor provides for the recovery of "his rent or possession, into whose hands soever the land comes, and it "is not the act of a stranger that can deprive the lessor of the advantage "of that condition which he annexed to the lessee's estate, when he "parted with the possession of the land." -

I find this doctrine and this case recognized by several writers on the subject, and no where disputed.—Bradby on Distress, ch. 4, page 113; Chambers's Landlord and Tenant, 746.

I do not see, indeed, on what ground it can be questioned.

No doubt the consideration for the rent is the enjoyment of the property, but it is not necessary that the lessee should actually occupy the premises in person, or by his tenants or servants; as he must be left in that respect to consult his own convenience. It is enough, if his landlord does nothing to prevent his occupying, and if he is not evicted by title paramount to the landlord's.

If he may enjoy, he is considered as enjoying, though he may choose to abscond as this tenant did, for he may return at his pleasure and resume his possession, unless he has in the meantime incurred a forfeiture of his term.

In *Goddale's case*, Dyer, 14, to debt for rent on a lease for years, the defendant pleaded *non occupavit*, and upon demurrer it was ruled without argument, to be no plea.

In *Bellasis v. Burbrick*, Lord Raymond, 170, it was moved in arrest of judgment, in an action for rescue of a distress, that it did not appear when the tenant entered, or how long he occupied; *sed non allocatur*, "for in cases of leases for years, the rent becomes due from the lease, "and not from the entry, and he has no need to aver occupation, because "the lessee is liable to pay the rent whether he occupies or not, but in "cases of leases at will, occupation must be averred."

In *Eaton v. Jacques*, Douglas, 455, these principles are affirmed, and the difference stated between the original lessee, (as Rogers is,) who is liable by his contract whether he actually enjoys or not, and the assignee, who is liable only in consequence of his occupation.

I refer also to Com. Dig. Pleader, 2 W. 50, and to Fortescue, 360.

If the lessor had entered and evicted the lessee, it would seem, that that must be pleaded, and could not be given in evidence under the plea of *non tenuit*, but the eviction must have been pleaded.

If a stranger had entered and evicted him, and he had attorned to the evictor, that, it has been decided in the case of *Hopcroft v. Keys*, 9 Bing. 113, might have been given in evidence under this plea.

But here the tenant was evicted by no one, but having deserted the premises, a stranger enters, whose possession can of course defeat no

right of the lessor, who is not shewn to have been in privity with him, and if he had been, that fact should have been specially pleaded.

*Per Cur.*—Postea to the defendant.

The learned judge who tried the cause, will direct the verdict to be entered for the amount of rent proved, upon leave reserved at the trial.

#### SHIRLEY, SUPERINTENDENT OF COMMON SCHOOLS v. HOPE.

A township superintendent of Common Schools, appointed under the act 7 Vic., ch. 29, since repealed by the act 9 Vic., ch. 20, sec. 45, has no legal authority to sue the collector of the township for monies received by him, *not in the nature of penalties.*

This was an action of debt brought by the plaintiff, as superintendent of common schools for the township of Camden, under the act 7 Vic., ch. 29, against the defendant, for money alleged to have been received and collected by the defendant as collector for the township of Camden, for the year 1845, which money is alleged to have been placed on the rate roll for the township of Camden, under the provisions of the above mentioned act.

The plaintiff alleged that it was the duty of the defendant, as collector, to pay over to him, as superintendent of common schools in Camden, the monies so collected; and that the defendant then became and was indebted to the plaintiff in the sum of 400*l.*, for so much money received by the defendant as such collector, for the use of the plaintiff as such superintendent, whereby and by reason of the non-payment of the said sum of money, an action hath accrued to the plaintiff, to demand and have from the defendant the sum of 14*l.*, the amount for which the action is brought.

The defendant demurred to the declaration, and assigned a great many causes of demurrer, and amongst others, that no authority was given by the act 7 Vic., ch. 29, to sue for any monies except penalties, and for forfeitures, and that the said statute had been repealed, and no action could be sustained under it.

*K. McKenzie*, of Kingston, for the demurrer, relied upon 13 M. & W. 267; 3 M. & W. 633.

*Breakenridge*, contra, contended that the action might lie, as the process had in fact been taken out before the passing of the act 9 Vic., ch. 20, sec. 45.

ROBINSON, C. J.—This action was brought by a township superintendent of common schools, appointed under the act, 7 Vic., ch. 29, under the idea that the 14th clause of that act, by making it his duty to apply for and receive from the collector of the township all the money received for common schools, gave him legal authority to sue the collector for any such monies in his hands not paid over, although the clause does not expressly give him power to sue, except for *penalties and forfeitures.*

But it is objected, that if the plaintiff could ever have maintained the present action under that statute, still he must now fail, because that act has been repealed by 9 Vic., ch. 20, sec. 45, and so it clearly has been since 1st January last, after which period this action was brought.

The new act makes different provisions for the several objects of the former act, abolishing altogether the office of township superintendent,

in which capacity alone, the plaintiff could have maintained the suit.

There is a saving in the repeal (45th) clause to the effect, that "all penalties incurred under the former act, shall be collected in the same manner as if that act were in force;" and the 14th sec. of the repealed act had provided, that the township superintendent was to sue for and collect by his name of office all penalties imposed by the act, with respect to which no other provision was made, and which shall be incurred by any officer or inhabitant of the township.

But the late township superintendent is certainly not suing here for any penalty or forfeiture, he does not therefore come under this provision in the new statute; and we cannot recognize him as an existing officer for any other purpose since the repeal of the act, for that puts an end to his duties and authority, and substitutes another officer for him.

The collector could not now legally pay into the plaintiff's hands the money for which he is here suing; he cannot therefore be liable to an action brought in his name.

MACAULAY, J.—The money was received by the collector to the use of the township superintendent, but not of an individual no longer superintendent.

Had the statute 7 Vic. ch. 29, continued in force, it is probable an action of debt might lie, at the suit of the township superintendent, against the collector for the school rates when levied; the act directing the collector to pay the same over to him, and authorising him to receive the same.—4 B. & C. 962; 9 B. & C. 752; 6 A. & E. 943.

But the act has been repealed, the plaintiff is no longer such superintendent, there is no such office or officer, and under such circumstances, I apprehend, the remedy is not an action by the plaintiff, in his own individual name, to recover money to which he is no longer entitled.

McLEAN, J.—By the 45th sec. of the act 9 Vic., ch. 20, the act 7 Vic., ch. 29, is repealed, from and after the 1st day of January, 1847, but all penalties incurred under the repealed act, shall be collected in the same manner as if the act continued in force, and all monies in the hands of township superintendents of schools on the 1st day of January, 1847, are required to be immediately thereafter paid over to the district superintendents, to be retained and disposed of by them as other monies remaining in their hands, at the end of the year.

The situation of township superintendent of schools is abolished, by the repeal of the act 7 Vic., ch. 29, and the only duty left to them to perform under the new act, is the collection of penalties incurred under the former act.

The amount which the plaintiff sues for is clearly not a penalty, and I do not see that under either act, the township superintendent had authority to sue for any other monies, though under the first he might be entitled to receive monies from the collector, for particular purposes connected with the schools.

This objection alone destroys the plaintiff's right of action, even had the situation been still recognized and existing by law; but the situation being abolished, no action could be maintained even for penalties, if it were not expressly sanctioned by the new act.

*Per Cur.*—Judgment for the defendant on demurrer.



## ALLAN v. GARVEN.

A., one of two partners, makes the following entry in the partnership books:—  
 “I have this day (5th April, 1841,) examined our books, and find them  
 “correct, and a balance due my copartner of 288*l.*,” *no promise* to pay the  
 balance is proved by B., the co-partner, and subsequently to that entry, the  
 two partners *continue the partnership business*, and afterwards finally settle  
 and dissolve. *Held, per Cur.*—That B. has no right of action against his  
 co-partner A. upon the balance stated in the entry.

Assumpsit on the common counts, money lent, money paid for defendant, money had and received, and on account stated.

The defendant pleaded, first, general issue.

Secondly, payment.

Thirdly, set off.

Verdict found for the plaintiff, 260*l.* damages.

The parties had been partners under articles executed in April, 1837, to continue till April, 1840.

They did not formally renew their co-partnership or extend the time, but continued in business, as partners, till October, 1841.

In April, 1841, contemplating a dissolution, they had a settlement of their accounts, when the following memorandum was written in the books of the firm, and signed by the defendant, 3rd April, 1841; “I have this day examined our books, and find them correct and a balance due “Charles Allan, of 288*l.* 16*s.* 1½*d.*, currency.

This, however, was not a final settlement, because the joint business continued till October; when upon a dissolution it was agreed, that this plaintiff should retain the books, and pay and collect debts due from or to the said firm, and the plaintiff alleged that it was understood between them, that the balance struck in April, 1841, should upon final settlement be increased or reduced, according to what might be realised of the assets of the firm.

He admitted, that the receipts had reduced the sum which he could otherwise have claimed from the defendant, to 174*l.* 9*s.* 9*d.*, and for that sum and interest, he recovered a verdict.

The defendant objected that no action at law could lie against him by his late partner, to recover the balance stated in April, 1841, as there was no promise on his part to pay it, and it was not a balance struck on a final settlement of the affairs of the co-partnership.

*J. Hector* moved for a new trial, on the law and evidence, and for misdirection; he cited 2 T. R. 479; 5 Q. B. R. 128.

*R. P. Crooks* shewed cause, and relied upon 9 Moore, 319, 5 M. & W. 21; 7 C. & P. 709; 1 Aust. 50; 2 Bing. 170; 10 Bing. 436.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the rule should be made absolute.

None of the cases cited, respecting the right of one partner to sue another at law, upon a mere settlement of accounts, carry the principle further than this, that there must have been either an express promise by the one to the other to pay that particular acknowledged balance, which takes that out of the partnership dealing, or it must have been a final statement of accounts after their partnership transactions have closed.

Now here the evidence was, that in April, 1841, the defendant ad-



mitted by an entry in writing in the partnership books, that at that date he owed the plaintiff 288*l.* 16*s.* 1½*d.*

There is no evidence whatever of any promise by him to pay that sum, then or at any time during the partnership, and thus to withdraw it from their joint assets.

It is not pretended, that it was a balance struck on any private or collateral transaction not involved in the partnership.

The plaintiff by his answer in Chancery, given in evidence at the trial, admitted in effect that this was a mere rest in their joint accounts, shewing how they stood at that date; and that it was agreed at the time of the dissolution, nine months afterwards, that the balance as struck in April was correct at that time, but that it was to be governed, as to the amount which the defendant should ultimately pay, by the account which the plaintiff was to render of the sums he should realise from the partnership books, which after the dissolution were to be placed in his hands; and it is evident that besides this, it must be necessarily dependent upon a settlement of transactions carried on by the firm between April and October, 1841, when they were first in a condition to strike a final balance.

The statement of accounts in April had in fact no other effect, than to render it unnecessary to go back beyond that date, when they should come afterwards to settle finally, and to allow an action to be brought as upon an implied promise to pay the balance thus stated, or any part of it, would go beyond what has yet been sanctioned in such cases.

*Per Cur.*—Rule absolute for a new trial, without costs.

#### O'CONNOR V. HAMILTON, SHERIFF.

When a bailable *ca. re.* is delivered to the sheriff, he is bound to proceed with due diligence in the arrest of the party. If a jury, upon being charged that they were not to find for the plaintiff unless they were satisfied that there had been neglect on the part of the sheriff, from which the plaintiff had suffered *some* damages, return a nominal verdict in favor of the plaintiff, *the court* will refuse to set it aside, upon the ground that to sustain even a verdict for nominal damages for not arresting a defendant upon *mesne process*, some clear proof of an injury received from the neglect to arrest should have been given by the plaintiff, and that no such evidence was offered.

A *ca. re.* to arrest one McGinn, at the suit of the plaintiff, was delivered to the sheriff on the 27th October, 1846. It was a district court process returnable on the 1st December, and was indorsed to take bail for 21*l.* 15*s.*

No prompt steps were taken to execute the writ, no warrant was made upon it; McGinn was understood to be living in the township of Adelaide.

It was proved that on the 29th October, a constable went to Adelaide to apprehend McGinn for a different matter, on a warrant from a justice of the peace, and did arrest him in the evening of that day.

The distance is about twenty-five miles from London, where the sheriff had received the writ. He stated himself to be unwell, and the constable giving him some indulgence in consequence, he escaped and immediately left the province.

A witness swore that on the 29th October, McGinn had been working

for him, and that on the 28th October he was at his own house, and could easily have been arrested if the sheriff had gone there.

It was not shewn what were his circumstances, further than that he had been in gaol, and had got out a month before he went away.

The writ was against McGinn and another defendant named McKenzie, who was not to be arrested.

Whether he was still in the province and able to satisfy the debt, or how the plaintiff had received injury or to what amount by McGinn not being arrested, was not shewn.

The learned judge told the jury, that the sheriff was bound to use due diligence on such occasions, but that having other duties to perform, he could not be expected to abandon them, in order to execute any particular process without delay.

He added that he did not think it was reasonable that the sheriff should be held responsible, because a man had escaped who resided twenty-five miles from his office, against whom he had a writ in his office two days. But that if they thought the delay amounted to neglect on the part of the sheriff, and that the plaintiff had sustained damage, they must give him a verdict for such damage.

Upon this charge the jury gave a verdict for the plaintiff, of 5*l.* damages.

*J. H. Hagarty* moved for a new trial on the law and evidence, and for misdirection.—The plaintiff, in order to entitle him to a verdict for any amount, even for nominal damages, in an action of this kind, when the injury complained of is the neglect to execute mesne process, must give some clear proof of injury received in consequence of the neglect.—7 Jur. 626; 2 P. & D. 608. No such evidence was given, and the verdict should be set aside.

*J. Duggan* shewed cause.—Some damage was shewn, and that is all that is necessary; besides no general issue was pleaded, and therefore there must have been nominal damages found for the plaintiff, though no evidence of damage had been given.—1 M. & W. 704; 2 M. & W. 739; 3 M. & W. 188; Roscoe, 610; 2 Bing. 317.

ROBINSON, C. J. delivered the judgment of the court.

We are of opinion that we must allow this verdict to stand; the sheriff clearly did not act with promptness; he delayed for two days to do any thing towards executing the writ, and though that would have exposed him to no action if he had taken the defendant and had him in custody, as commanded, at the return of the writ, yet by the omission to use such reasonable diligence as he might have used, he incurred the risk of what has happened, that is, of the debtor's escape, by which the plaintiff's process would be rendered useless to him.

The case went to the jury upon a charge at least as favourable to the sheriff as could with propriety have been given, for I consider that the probability of the sheriff's bailiff having other writs to execute about the same time, would not excuse him for delaying to act upon this.

He must see that he employs bailiffs enough to do whatever is to be done, and there is no ground for making allowances for other writs coming, because we may suppose that the fees payable for executing such writs, are a sufficient remuneration for a trustworthy person performing that particular service, as I believe they are.

Then the jury being expressly told, that they were not to find for

the plaintiff unless they were satisfied there had been neglect from which the plaintiff had suffered some damage, have given this small verdict of 5*l.*; and we should of course not interpose to set it aside, unless we were convinced that the evidence given did not warrant even a nominal verdict being rendered for the plaintiff.

We think it is impossible to hold that the cases in which the courts have appeared to consider, that in order to charge the sheriff in an action for escape, or for not arresting on mesne process, some damage must be proved, are cases where the defendant in the process had not wholly escaped as in this case, but where the sheriff had him at the return of the writ, or where having suffered him to escape while he was in on mesne process, he had retaken him and still held him in custody.

In comparing this case with *Planck v. Anderson*, 5 T. R. 37, of which the authority was recognized in the later case of *Williams v. Mostyn*, 4 M. & W. 144, and referring also to the cases reported in M. & W. 702, and 12 Ad. & Ell. 492, we cannot hold this verdict to be against law, when the jury have found that the plaintiff did sustain damages, and when the fact was, that the debtor having escaped and never being taken on this process, as he easily might have been, the plaintiff has undoubtedly not been delayed merely in his suit against this defendant, but has wholly lost the benefit of the process which he had sued out, and for all that appears may have lost altogether the means of pursuing any remedy against him.

There was no doubt as to the debt being due, and it was not shewn that McGinn was unable to pay it, or any part of it.

The damages were under the circumstances moderate, and as due diligence was certainly not used, we must let the verdict stand.

*Per Cur.*—Rule discharged.

### GLEESON V. WALLACE.

A defendant's counsel, in order to obtain from a witness an opinion as to the handwriting of a plaintiff's receipt in full to the action, proposed to put into his hands other papers purporting to be signed by the plaintiff, *but in no way connected* with the cause. The learned judge *à nisi prius* objected to this course, and would not admit of the witness being examined as to *the other writings*, till he had first, from his own recollection of the plaintiff's handwriting, given an opinion upon the signature of the receipt. *Held, per Cur.*, on notice for a new trial, that the learned judge had properly refused to admit the evidence.

Assumpsit for work and labour, and account stated.

The defendant pleaded non assumpsit as to all but 48*l.* 1*s.* 1*d.*, and as to 34*l.* 4*s.* 3½*d.*, parcel of the above 48*l.* 1*s.* 1*d.* he pleaded payment, and to the residue of the 48*l.* 1*s.* 1*d.*, set-off.

The defendant at the trial produced a paper, purporting to be a receipt from the plaintiff in full of all demands, to which there was no subscribing witness, and he attempted to prove the plaintiff's signature by calling a person acquainted with his writing.

The witness called for that purpose swore in the first place, that he had seen the plaintiff write.

The defendant's counsel then put into his hands another paper pur-



porting to be signed by the plaintiff, and which this witness had himself attested, but which was in no manner connected with the subject matter of this action.

The witness having declared that this latter paper was signed by the plaintiff, he was then asked by the defendant's counsel, what he thought of the signature attached to the receipt, and he answered that from his knowledge of the plaintiff's writing, he could express no opinion upon it.

The learned counsel then proposed to put into his hands other papers, purporting to be signed by the plaintiff, but having no connection with this cause, in order to obtain his opinion upon them before questioning him further respecting the signature to the receipt, and with the view of leading him to form and express an opinion upon the genuineness of that signature.

The learned judge objected to this course, and would not admit of the witness being examined as to the other writings till he had first, from his own recollection of the plaintiff's handwriting, given an opinion upon the signature to the receipt in question.

*R. P. Crooks* moved for a new trial, for the rejection of proper evidence.

*H. Eccles* shewed cause.—1 C. & K. 51.

ROBINSON, C. J., delivered the judgment of the court.

There is no doubt, in our opinion, that the learned judge was right in rejecting the evidence offered.

If the witness had been called on the other side, to discredit the receipt, and had assigned as his reason for not believing it to be genuine, that it differed in some particular point from the plaintiff's ordinary mode of signing his name, then we conceive it would have been competent for the defendant to endeavour to convince him that he was mistaken in the ground of his opinion, by exhibiting to him other proved or admitted signatures of the plaintiff, which by containing or wanting the peculiarity on which he laid stress, might convince him or satisfy the jury that he was in error.

But under the circumstances reported by the judge who tried the cause, we think the other papers were properly rejected; and indeed the defendant's council concedes the point, that it would be inconsistent with the established rules of evidence to have received them for such a purpose; but he contended that according to his recollection of the trial, this question was presented not exactly as it would seem to have arisen from perusing the judge's notes, but upon the examination of Mr. Thomas, another witness, or upon Salter, the first witness, being recalled at the instance of the plaintiff.

We have referred however to the learned judge, and his recollection of the trial fully confirms his notes taken at the time.

We must therefore abide by his report, and the verdict which was rendered for the plaintiff for 28*l.* damages, we have little doubt, from the tenor of the whole evidence, was just.

The defendant's conduct and admissions seem inconsistent with the belief, that he could have held the plaintiff's receipt in full, given at the time this paper purports to have been given.

*Per Cur.*—Rule discharged.



## APPLETON, PAIGE AND APPLETON V. DWYER, AN ABSCONDING DEBTOR.

In an undefended action against an *absconding debtor* (the maker of a note), the plaintiffs (Appleton, Paige and Appleton) proved the handwriting of the defendant, but could not shew that James W. Paige & Co., the parties to whom the note was made payable, were the three plaintiffs in the suit—a verdict was taken, subject to the opinion of the court as to this point—a rule to enter judgment for the plaintiffs was taken out in term, and served by affixing a copy in the Crown office and leaving another copy at the defendant's last place of abode in this province, with a grown-up person there.—*Held, per Cur.*, that, in the absence of any cause shewn by the defendant, the debt was sufficiently proved to satisfy the 7th section of the Absconding Debtors' Act, 2 Will. IV. ch. 5.

Assumpsit against the defendant, upon three promissory notes made by him in Boston, payable to the order of James W. Paige & Co.

Judgment by *nil dicit* was signed, and the plaintiffs went down to assess their damages.

The signature of the defendant to the notes was proved.

No one appeared to contest the plaintiff's demand on the part of the defendant; but there being no evidence given that by James W. Paige & Co. was meant these three plaintiffs, the learned judge reserved, for the consideration of the court, whether the plaintiffs could properly be allowed to recover without some such evidence; because the Absconding Debtors' Act, 2 Will. IV. ch. 5, sec. 7, requires that the plaintiff "shall prove his cause of action in the same manner as if the general issue had been pleaded."

*J. Lukin Robinson*, for the plaintiffs, moved to be allowed to enter judgment on their verdict, having served their rule *nisi* by affixing a copy in the crown office, and leaving another copy at the defendant's last place of abode in this province with a grown-up person there.

ROBINSON, C. J., delivered the judgment of the court.

At the time of the act being passed, upon the general issue pleaded, it would have been necessary in a defended cause to have proved that these plaintiffs did compose the firm.

The question is, whether it is necessary to do so since the new rules, there being now no general issue that can be pleaded to a count upon a promissory note.

The doubt suggested is, whether we should look at the record in such an action against an absconding debtor, when judgment by *nil dicit* appears upon it, as if the making of the note only were denied by a proper plea—in which case the evidence which the plaintiffs omitted to give in this case would not be required; or whether we should treat it as if it contained a plea of general issue to the count on the note, which it could not do under the new system of pleading, and which it certainly would not have contained, if the party had appeared and pleaded.

The 7th clause of 2 Will. IV. ch. 5, provides that it "shall be incumbent on the plaintiff to prove his cause of action in the same manner as if the general issue had been pleaded, or the *deed denied*, in case the action shall have been brought on any specialty."

Now if a bond had been given to Messrs. James W. Paige & Co., as these notes were made and had been sued on by these three plaintiffs, averring, as they do in this declaration, that they were the persons intended, then a plea merely denying the bond would have admitted the

right of the plaintiffs to sue on it as being the obligees; they would have had only to prove the bond to entitle them to recover; and as there is now no general issue to an action on a note, more than on a specialty, it would seem reasonable to place them on the same footing, by holding the words "general issue" in the statute to apply only to such cases as admit of that method of defence.

If the defendant in this case had appeared and pleaded *non assumpsit*, the plaintiffs might have signed judgment.—3 Jurist, 1172.

But if we should consider that, strictly speaking, such proof may be exacted in these cases as would formerly have been given under *non assumpsit*, although that plea is no longer within the power of the party to plead, yet here no one appearing to shew cause against this rule when legally served, the objection being one of a formal rather than substantial nature, as Paige & Co. must most probably have meant some individuals not named—and there is no room to doubt the firm consisted of these plaintiffs—and as the defendant has yet ample opportunity to contest the judgment on this or any other ground, if the fact has been erroneously assumed, we think the plaintiffs may be allowed to enter up their judgment; for it is to be considered that the notes being produced by the plaintiffs in support of their joint action, is of itself some proof that they are the persons composing the firm of Paige & Co.

*Per Cur.*—Postea to the plaintiffs.

#### MILLARD v. KIRKPATRICK.

To an action of trover for 3000 feet of oak timber and 200 bushels of wheat, the defendant pleads that he was seised in fee of a certain close, and being so seised, &c., he cut the said timber and wheat thereon growing, and afterwards, &c., delivered the same to one A. B. to be kept, who delivered them to the plaintiff, wherefore defendant took them out of his possession, &c. The plaintiff replies, that the property was the plaintiff's property, without this, &c. Demurrer to replication, that it traversed colourable immaterial matter; also general demurrer to the plea, that it does not shew that the property belongs to the defendant. *Held, per Cur.*, Replication bad. *Held also*, Plea good on general demurrer. *Quære*: If good on special demurrer?

Trover for 3000 feet of oak timber and 200 bushels of wheat.

Plea.—That before the said time when, &c., the defendant was seised in fee of and in a certain close, being No. 216 in the township of Stamford; and being so seised on the day and year first aforesaid, the defendant cut 3000 feet of oak timber and 200 bushels of wheat then growing and being in said close, being the same mentioned in the declaration, and afterwards, and before, &c., the defendant delivered the same to one Thomas Millard to be kept, who delivered them to the plaintiff, wherefore defendant took them out of his possession, &c.

Replication.—That the property was the plaintiff's 'property, without this, that the defendant became possessed of or acquired the same, or any part thereof, in the manner or by the means set forth in the plea.

Demurrer.—That the replication traversed colourable immaterial matter.

The plaintiff objected to the plea on general demurrer, because it did not shew that the property belonged to the defendant, or that Thomas

Millard had not authority to dispose thereof, &c., or that it did not belong to the plaintiff, or what sort of bailee Thomas Millard was.

*Boomer*, of Niagara, for the demurrer, cited 2 M. & W. 95 ; 1 U. C. R. 377.

*H. Eccles*, contra, referred to 8 Jur. 809 ; 13 L. J., N. S., 189.

ROBINSON, C. J.—I consider this replication bad for the reason assigned.

It should have traversed the defendant's right to the goods, and not merely re-asserted the plaintiff's right, traversing the defendant's averment that he got them in the manner stated in the plea.

The case in this court of *Abrahams v. Thorne*, 1 U. C. R. 377, is in point.

Indeed, it was not attempted to support the replication ; but the plaintiff excepts to the sufficiency of the defendant's plea, because it does not state in express terms that the trees and wheat growing in the close were his property.

The plaintiff denies that it follows that these belonged to the defendant from his being seised in fee of the land, and no doubt the fact may have been otherwise ; but *primâ facie* he entitles himself to the trees and the wheat, when he states that they were growing on his land.—2 M. & W. 95.

If they were held by another person, under a separate claim of right, it was for the plaintiffs to reply that.

MACAULAY, J.—The case in *Cro. El.* 146, shews that the plea would be probably bad on special demurrer, for not sufficiently shewing the defendant's right to the property, except argumentatively, as inferred from his being seised in fee of the close off which he cut the same ; for, consistently with this, the trees and wheat may have belonged to the plaintiff ; but on general demurrer I should suppose it sufficient ; and clearly, the plaintiff cannot by way of replication traverse express colour in the plea.

MCLEAN, J., concurred.

*Per Cur.*—Judgment for defendant on demurrer.

## BEAMER V. DARLING.

An attorney is an admissible witness, to prove by whom he was employed to sue out a bailable writ.

Trespass and false imprisonment.

Pleas—General issue, and special justification demurred to.

Verdict for plaintiff 25*l*.

The defendant, as the clerk or agent of one Burger, had made an affidavit of debt, in order to obtain a *ca re.* against this plaintiff at Burger's suit.

He was not shewn to have done anything more than making the affidavit.

In order to make him liable for the trespass in arresting under the writ, which had been afterwards set aside, the attorney, who had sued out the writ, was called, and the plaintiff's counsel desired to prove by him on the trial of this suit, that the defendant Darling was the person



who had instructed and employed him to sue out the writ, and to have the arrest made.

He was objected to on the ground of professional confidence; it was contended that he should not be allowed to disclose anything to the prejudice of the party who had employed him, at least nothing which the latter had said or done in consequence of the retainer.

He was not admitted, but the cause went on, subject to the doubt whether the merely making the affidavit was sufficient to connect this defendant with the trespass, and the defendant was to have leave to move to enter a nonsuit.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Levy v. Pope*, Moo. & Mal. 410, is an authority for holding, that for the mere purpose of proving by whom he was employed, in other words who was his client, the attorney was an admissible witness, and that the case did not come within the objection on the ground of professional confidence.

The nonsuit therefore could not be ordered at any rate on the ground of this defect in the evidence, because the plaintiff had not the opportunity which he ought to have had, of proving his case by the witness whom he proposed to examine.

We could not on the other hand, so far as this point is concerned, let the verdict stand, because it is not yet known what the attorney would have proved, if he had been allowed to give his evidence.

We should have had to allow a new trial without costs, or with costs to abide the event; but the court having just given judgment for the defendant on the demurrer to his plea, which bars the whole action, that of course makes an end of the suit.

The plaintiff has had permission to move an affidavit to amend his pleadings by replying.

If that should be allowed, which upon hearing the parties I imagine not probable, then a new trial will of course be necessary, and the order would in that case be made on such terms, as regards costs, as shall be thought right.

*Per Cur.*—Rule for entering nonsuit discharged.

---

#### ECCLES V. MOODIE, SHERIFF OF VICTORIA DISTRICT, AND BARRY.

Where the plaintiff (defendant in a *capias*) sues the sheriff and the plaintiff in the writ arresting him, as *joint trespassers*, he must take care that his *record of the pleadings* does not shew him to be proceeding against the sheriff for one act of trespass, and against the plaintiff in the writ for another act of trespass. When the record does shew this, the court will set aside a verdict obtained by the plaintiff against both the defendants on the issues raised.

Trespass and false imprisonment in one count, charging the trespass committed on the 1st November, 1845, and on divers days between that and the commencement of this suit; and in a second count, charging a false imprisonment for six weeks, between August 12, and 1st Sept., 1846.

Moodie pleaded not guilty; and 2ndly a justification under a *ca re*. at the suit of defendant Barry, delivered to him to be executed, shewing the writ returned.



Barry pleaded also the general issue, and secondly, a justification under the same writ set out by the sheriff.

The plaintiff replied to Moodie's *special* plea, by new-assigning another trespass committed on the said 1st Nov., 1845, and on divers days between that day and the commencement of the action, and he answered Barry's special plea by a new assignment in the same terms.

The 1st Nov. in the count and in the new assignment is laid positively not under a *videlicet*.

The defendant Moodie rejoined to the new assignment, that before the said time when &c., to wit on 10th Nov., 1845, a writ of *ca re*. issued at the suit of Barry against the plaintiff, returnable on the last day of Michaelmas Term then next, (the writ relied on in the pleas was stated to have issued on the 8th August, 1845, and to have been returnable on the last day of Trinity Term;) that afterwards, to wit, on the 10th Nov., 1845, this writ was delivered to him to be executed, and he justified an arrest under it on 10th Nov., and the detention charged in the declaration.

The defendant Barry rejoined to the new assignment, justifying under the same writ as set out by the sheriff, and which he stated to have been sued out by him on the 10th Nov., 1845. The plaintiff surrejoined to Moodie's plea to the new assignment, admitting the issuing of such writ and its delivery to the sheriff, as such sheriff, but averred that the defendant at the said time when &c., in the declaration mentioned, of his own wrong, and without the residue of the cause alleged by him in his plea to the new assignment, imprisoned the plaintiff and detained him, as in the declaration alleged, concluding to the country.

To the plea of defendant Barry to the new assignment, he answered, that the writ sued out by him was an irregular writ; and that on the 16th December, 1845, the said writ and the arrest, and all proceedings thereupon, were set aside by order of a judge, and the defendant ordered to be discharged.

The defendant Barry denied that the writ was set aside in manner and form as the plaintiff alleged.

The issues, then, between the parties were, as to the sheriff Moodie, *that he did not arrest and imprison the plaintiff* under the second writ as he alleged he did. And as to Barry, that the second writ was not set aside by a judge as irregular; an order of a judge for setting aside the writ and arrest was produced, and proved on the trial.

It was proved also that the plaintiff Eccles, having been arrested on the writ issued in August, 1845, and imprisoned in gaol at Belleville, for want of bail, an application was made to a judge in chambers at Toronto, to set aside the arrest on account of defects in the affidavit to hold to bail, and that on the 13th Nov., an order for his discharge was made, but the plaintiff's attorney being in Toronto, and anticipating that an order must be made, sent instructions to his clerk to have him discharged, and that his clerk did in consequence send a written request in the name of his principal, to the sheriff on the 10th Nov., to discharge Eccles from custody on the writ for which he was detained.

Whether the sheriff did or did not receive this notice on the 10th Nov., was not clearly made out.

On the 15th Nov., the judge's order which had been made on the

13th, was delivered to the sheriff, but he did not discharge Eccles, because in the meantime the clerk of the plaintiff's attorney had sued out another *ca re.* against Eccles, at the suit of Barry, which was placed in the sheriff's hands on the same day (10th Nov.,) that the order was sent from the plaintiff's attorney's office for his discharge.

Eccles was discharged from custody under the second writ several weeks afterwards, by order of the court, on various exceptions taken to the plaintiff's proceedings.

The complaint endeavored to be established against the sheriff was, that although he received the order from the plaintiff's attorney's office, for the discharge of Eccles, before any second writ came to him, yet instead of discharging him as he was bound to do, he wrongfully detained him upon an intimation that the second writ was coming.

It was proved that when the second writ came to him, he went to the gaol and told Eccles that he had received an order to discharge him; but that he must still detain him, because he had received another writ against him at Barry's suit.

On the part of the sheriff, it was denied that he had received or knew of the discharge from the first writ, until the second writ came to him.

There was evidence however of admissions made by him, that the discharge had been first received, and upon that question of fact being left to the jury, they found that he had received the order to discharge before he got the second writ.

The learned Chief Justice, at the trial, considered that as Barry rested his defence in pleading, solely on his denial of the second writ having been set aside, and as that fact was proved, the plaintiff was clearly entitled to a verdict against him; for he stood in the situation of having attempted to justify an imprisonment of Eccles for several weeks, under a process which he had sued out, and which was set aside as illegal.

The jury did not sever in the damages to be awarded against the two defendants, and they gave a verdict for plaintiffs for 50*l.*

Cameron, Sol. Gen., and Sullivan, moved for a new trial, or to arrest the judgment as against Barry. They relied upon the following cases: 1 Bing. 317; 1 Saund. 299, a. (b.); 1 Bing. N. C. 380; 11 A. & E. 829; 5 Bing. N. C. 489; 6 Dowl. 461; 4 B. & C. 626; 5 A. & E. 321.

Blake and Read shewed cause.—They cited the following authorities: 5 B. & C. 660; Isaac v. Farrar, 11 Price; 7 A. & E. 167, Lucas v. Knockles, 10 Bing.; 1 Dowl. 725; Lucas v. Knockles, in Error, 2 C. & R.; 2 Saund. 5, note (1); 3 M. & W. 40; 2 Jurist, 53; 1 Wilson, 154; 2 Bl. 1218; 2 B. & Al. 473; 1 An. 261; 8 A. & E. 449; 5 Tyr. 721; 5 Dowl. 66; 1 L'd Raymond, 465; 2 Wils. 4; 1 Saund. 299, (c); 1 Esp. 44; Cro. Jac. 379; 2 C. & P. 453; 1 Salk. 56; 13 M. & W. 811; 3 Salk. 362; Smith's L. C. 211; 2 Wils. 359.

ROBINSON, C. J., delivered the judgment of the court.

I was not clear, at the trial, that a *recovery* could be supported as against the sheriff, considering the *bearing of the evidence* upon the *pleadings*, and the effect of the pleadings as narrowing the plaintiff's ground of complaint; and I intimated, at the time of the verdict being received, that it would be well that the case should be reviewed *in banc*, so far at least as the sheriff was concerned.

Upon mature consideration, after the argument which we have heard

upon the case, it appears to me to stand thus; the plaintiff seeks by this action to make the sheriff and Barry, the plaintiff in the writ of *capias*, liable for a joint trespass; he can therefore only recover against them both, for some illegal act in which they both simultaneously concurred.

Now a good deal was said at the trial, and I am afraid a good deal of stress was also laid by myself in my charge to the jury, upon the illegality of detaining Eccles in custody, in the interval which occurred between the sheriff being directed to discharge him from imprisonment under the first writ, and the receipt by the sheriff of the second writ.

The sheriff denied that he did so, or rather he denied that there was any such interval, while on the other hand, the plaintiff imputed to him that he did knowingly detain him, for some time at least after he had been directed to discharge him, either by collusion with the plaintiff's attorney, who had been satisfied of the irregularity of the first writ, or to save himself the trouble of having to hunt up the debtor again, after the new writ should come to him.

This was complained of as manifestly improper and oppressive.

There was some evidence to support the case, in that view of it, against the sheriff, whether conclusive or not it was for the jury to judge.

They found for the plaintiff a verdict against both the defendants for 50*l*.

But when we come to look closely at the pleadings, it is evident that the plaintiff, by joining issue with the defendant Barry, upon his justification to the newly assigned trespass, as being a trespass committed under the second writ, has absolutely confined his cause of action against him to such an imprisonment as might have been justified under the second writ, if it had not been set aside, as the plaintiff alleges it was, for irregularity.

The plaintiff and Barry rest their cause, as between them, upon the issue, whether that writ was set aside or not.

If it was not set aside, but is a valid and existing writ, then the plaintiff admits there was nothing to complain of as against Barry; if it has been set aside, as the plaintiff alleges, then he claims a right to recover damages against Barry for an imprisonment, which he does not deny took place under colour of that writ.

The plaintiff has thus inevitably placed himself in this situation, that he can only recover against the sheriff, as a joint trespasser with Barry, for an arrest and imprisonment such as Barry could justify under the second writ if it had remained in force; in other words, his complaint against the sheriff, upon which alone he can support a joint verdict, must be for making the very arrest on which he charges Barry as being the party who ordered it.

But then the pleadings, as they apply to the sheriff, are inconsistent with such a course; for the plaintiff denies that the sheriff took or imprisoned him under the second writ, on which the sheriff relies as his justification in answer to the new assignment.

It is plain then, that the plaintiff, by his own shewing, is proceeding against the sheriff for a trespass which he declares was not committed under the second writ, and against Barry, for a trespass which he admits to have been committed under colour of that writ; so that this verdict which he has obtained for damages for a joint trespass, on which ground alone he could recover, must, according to the record, have been given



for two separate acts of trespass—one by the sheriff, not under colour of the second writ, and another by Barry, under colour of that writ; the trespass of Barry, too, being only constructive, as a consequence of the act done by the sheriff for him and in his name, which makes the connection between the two inseparable, and shews that there could not be a recovery except in respect to the same identical trespass, which could not by possibility have been committed at the same time under the second writ and not under the second writ.

As it is uncertain in respect of which alleged trespass the verdict proceeded, we think there must be a *venire de novo*; and the plaintiff will consider how he will shape his case to meet his evidence upon another trial, or whether he will apply to amend the pleadings.

*Per Cur.*—A *venire de novo* to issue.

---

---

## PRACTICE COURT.

### EASTER TERM, 11 VICTORIA.

---

Before the HON. MR. JUSTICE JONES.

---

PERRIN ET AL. V. EAGLESUM.

Unless the plaintiff, upon taking out a rule to discontinue, serves the defendant at the same time with an appointment to tax costs, the defendant may regard the rule to discontinue as a nullity.

This was a motion for judgment as in case of a nonsuit, for not proceeding to trial pursuant to notice.

*J. C. Morrison* shewed cause.—The record was entered for trial at the last Home District Assizes, and was withdrawn on account of the discovery by the plaintiffs, that the indorsement of the defendant's name on the note sued upon, was a forgery.

On the 11th June the plaintiffs took out a rule to discontinue, which was served upon the agent of the defendant's attorney on the 12th, but no appointment for taxation of costs was then taken out.

On the 17th June inst., this rule was moved for, and taken out and served on the 18th.

On the 19th June, the plaintiff's attorney took out and served upon the defendant, an appointment for the taxation of costs upon the rule to discontinue.

The defendant did not attend upon this appointment.

JONES, J.—No step having been taken by the plaintiff to tax the costs, the defendant was at liberty to regard the rule to discontinue as a nullity, and to make this motion.

The course pursued by the parties in England, is to take out and serve the rule to discontinue and the appointment for taxation of costs at the same time.

The defendant was guilty of *laches* in not taking out the appointment for taxation of costs, as in the case of 2 C. & M. 430.



I think there is a sufficient excuse for the plaintiff not to be forced down to trial, and I therefore discharge this rule upon payment of the costs for not proceeding to trial pursuant to notice, and leave the defendant to carry down his cause to be tried by proviso hereafter, unless the plaintiff shall in the meantime discontinue and pay costs.

A little accommodation on the part of the defendant's attorney or agent, would have superseded the necessity of this application, as it was no doubt the intention of the plaintiffs to discontinue and pay the costs.

*Per Cur.*—Rule discharged upon payment of costs for not proceeding to trial pursuant to notice.

---

#### DOE DEM. DE REIMER V. GLASS.

Where a plaintiff does not proceed to trial pursuant to notice, from the absence of a material witness, and before the term requests the defendant's attorney not to put him to the expense of moving for judgment as in case of a nonsuit, offering to enter into the peremptory undertaking, to pay the costs of not proceeding to trial, and to satisfy the plaintiff that he would be entitled to discharge a rule for a nonsuit. *Held, per Cur.*—Rule discharged on peremptory undertaking, the plaintiff paying no costs except those for not proceeding to trial.

In this case *J. C. Morrison* shewed cause, against a rule for judgment as in case of a nonsuit for not proceeding to trial pursuant to notice.

He filed an affidavit, shewing that the plaintiff was unable to procure the attendance of a material witness, for whom a special messenger had been despatched to the United States; and also that he, as attorney for the plaintiff, had two or three days before the beginning of term, requested A., the defendant's attorney, not to move this rule, and if he, A., would make out his bill of costs, he would have them paid at once, as he was desirous of avoiding the expense of a motion: that upon A. stating his desire to compel the trial of the cause at the next assizes, he (*Morrison*) agreed to enter into the peremptory undertaking to proceed to trial at the next assizes, and that he would obtain, if required, a sufficient affidavit for the perusal of A. to satisfy him that the lessor of the plaintiff would be entitled to discharge a rule for a nonsuit, and that he has since during the term, and before the rule in this cause, offered the same.

*JONES, J.*—I think the offers of the plaintiff should have been acceded to by the defendant, and therefore, upon the authority of the case in 2 C. & M. 470, I order the plaintiff to pay the costs, for not proceeding to trial, but not the costs of this rule.

*Per Cur.*—Rule discharged on peremptory undertaking and on terms as to costs.

---

#### SLIGH V. CAMPBELL.

Where an arrest is made upon a judge's order, and no sum is specified in the affidavit, the stat. 2 Geo. 4, ch. 1, sec. 8, does not apply; *Seemle*, if the sum is mentioned in the affidavit, and endorsed in the margin of the writ, that would be sufficient, without endorsing it on the back of the writ.

The defendant obtained a rule upon the plaintiff, to shew cause why the arrest of the defendant should not be set aside, and the defendant

discharged from custody, on the ground that there was no indorsement for bail upon the writ, nor any direction to the sheriff to take bail for any sum.

Upon the margin of the writ was written "by judge's order for 50*l.* R. P.," and upon the back of the writ was indorsed "50*l.*"

The plaintiff contended that it was in pursuance of the statute 2 Geo. 4, ch. 1, sec. 8; the words of the section which contains the direction are, "And the sum or sums specified in such affidavit shall be "indorsed on such writ or process, for which sum or sums so indorsed, "the sheriff or other officer to whom such writ or process shall be directed shall take bail, and for no more."

JONES, J.—This case does not come within the statute, the arrest being upon a judge's order, and no sum being specified in the affidavit.

I should think the indorsement in the margin sufficient, without reference to the indorsement of the 50*l.* on the back of the writ, in a case within the statute.

*Per Cur.*—Rule discharged without costs.

#### MOFFATT v. McMARTIN, ONE, &c.

Where a plaintiff serves a defendant, *an Attorney*, with a demand of plea *in vacation*, and signs judgment and serves his notice of assessment, if the defendant applies within *a reasonable time* after judgment has been signed, to set aside *the judgment* for irregularity, he will succeed.

The defendant has not waived the irregularity of the plaintiff's proceedings, by neglecting to move to set aside *the demand of plea*.

This was an application, by *Phillpotts*, to set aside an interlocutory judgment and all subsequent proceedings for irregularity.

On the 19th of April, 1847, the bill was filed against the defendant, and served with a demand of plea personally.

On the 27th of April, interlocutory judgment was signed for want of a plea.

On the 28th of April, notice of assessment of damages, from the assizes at Perth on the 11th of May, was served upon the defendant's agent at Toronto.

On the 6th of May, the defendant served notice on the plaintiff of his intention to move to set aside the assessment, on the first day of the succeeding term, if the plaintiff should proceed to assess damages pursuant to notice given; and also that the defendant would apply to a judge in chambers, to set aside the interlocutory judgment for want of a sufficient service of a demand of plea.

On the 7th of May, a summons was taken out to set aside the interlocutory judgment; and on the 8th, the parties attended thereon before the Chief Justice, but no order was made; and on the 11th of May, damages were assessed.

*Richards*, for the plaintiff, contended that the irregularity was in the service of the demand of plea in vacation, and that the defendant came too late after interlocutory judgment was signed to take advantage of the irregularity; and cited *Haight v. Boulton*, in this court, and also 3 Dow. 112, and 5 Dowl. 419.

*Phillpotts*, in support of the application, contended that as the demand

of plea could only be regularly served in term, that the defendant was at liberty to regard this service in vacation as a nullity, or to consider it as a demand to plead within the time allowed, if the service had been made in the ensuing term, and that he was only bound to notice irregular proceedings after the interlocutory judgment was signed.

JONES, J.—In *Haight v. Boulton*, the application, as in this case, was to set aside the interlocutory judgment; and the rule was discharged, not because the defendant did not apply promptly to set aside the service of the demand of plea, but because he failed to apply to set aside the interlocutory judgment within a reasonable time after it was signed.

It was not objected that the application should have been to set aside the service of a demand of plea.

So in *Cormack v. Radenhurst*, 1 U. C. R., 391, the application was to set aside the interlocutory judgment before me in the Practice Court, on the same grounds.

In giving judgment I observed, that the demand of a plea in vacation was irregular; but that the defendant, having allowed the plaintiff to sign judgment and give notice of assessment, had by his own delay waived the irregularity.

He should have applied to a judge in chambers, to set aside the service of the demand of plea or "the interlocutory judgment." In that case the bill was filed in April, and a demand of plea was served in vacation before Trinity—judgment was signed on 3rd of August—and notice of assessment was served on the 21st September; damages were assessed on the 13th of October, and the application was made the following term.

Here the application was made in due time after interlocutory judgment, and within eighteen days after the service of the demand of plea at Perth.

I cannot hold that the defendant has waived the irregularity by the delay in his application.

Strictly, I am inclined to think, the application should properly have been made in due time after the service of the demand of plea. It has not been so held heretofore; and as the defendant came promptly after notice of judgment being signed, and without any unreasonable delay after service of the demand of plea, I make the rule absolute, but without costs.

*Per Cur.*—Rule absolute, without costs.

---

#### MADDOCK V. CORBET.

Where a cause has been taken down to trial and withdrawn, and in the ensuing term a rule for judgment as in case of a nonsuit is discharged upon the peremptory undertaking and payment of costs, and the plaintiff afterwards obtains a judge's order to amend his declaration on payment of costs, and, without paying the costs in both cases, serves the defendant with his amended declaration: *the Court* set aside the filing of the amended declaration with costs.

The defendant obtained a rule last term, calling upon the plaintiff to shew cause why the filing of the amended declaration in the cause and



all subsequent proceedings, should not be set aside as irregular, with costs to be paid by the plaintiff, upon the ground that the costs upon the order to amend the declaration had not been paid, or taxed, or tendered, previous to the filing of the amended declaration, or previous to making the amendment, and the payment of the same being a condition precedent by the terms of the order, and also the costs of the day not having been paid, or tendered, or taxed, previous to the said amendment; and also upon the ground that no costs were ever taxed upon the said order, or paid; also upon the ground of delay in the plaintiff's proceedings, and the demurrer filed never having been withdrawn; also upon the ground that a rule nisi for judgment as in case of a nonsuit, was obtained in the cause and discharged upon the peremptory undertaking and payment of costs, and no such costs having been paid or tendered; and on other grounds disclosed in affidavits and papers filed. Or why the assessment of damages in the cause should not be set aside as irregular, with costs, upon the grounds above stated; and also upon the ground that no sufficient notice of trial and assessment was served, and the same having been served too late.

It appeared, from the affidavits filed, that the cause was taken down to trial at the assizes for this district, in the autumn of 1846, and withdrawn.

In the ensuing term the defendant obtained a rule, calling on the plaintiff to shew cause why judgment as in case of a nonsuit should not be given for the defendant, which was discharged in the same term upon the peremptory undertaking and payment of costs.

On the 5th of November, the plaintiff obtained a judge's order to amend his declaration on payment of costs.

An appointment for the taxation of costs upon this order was taken out by the plaintiff's attorney, and enlarged by the defendant's attorney to the 3rd of May; but no taxation was had, the plaintiff's attorney not appearing before the master to tax the costs at the time appointed, and the attorneys for the different parties having in the mean time endeavoured by an amicable arrangement to settle the amount of costs.

The defendant's attorney sent his clerk, on the 3rd of May, to attend the master, considering the attempt to settle the amount had failed; and the plaintiff's attorney did not attend, considering the matter as amicably settled.

On the 5th of May, the plaintiff's attorney tendered to the defendant's attorney 2*l.* 2*s.* 6*d.*, as the costs upon the amendment of the declaration, as in his estimation agreed upon, which the defendant refused.

The plaintiff's attorney then served the copy of the amended declaration, which the defendant's attorney refused to accept.

No offer appeared to have been made to pay the costs for not proceeding to trial pursuant to notice, nor were the same taxed.

No arrangement, as understood by the defendant's attorney, was made for settling the costs of the amendment, nor had the amount been ascertained by taxation.

JONES, J.—The notice of trial and assessment was served too late. The assessment of damages cannot be allowed to stand, notwithstanding the terms imposed by the master in enlarging the appointment for taxation at the instance of the defendant's attorney.



The defendant was entitled to the costs on the amendment, and also his costs on account of the plaintiff's not proceeding to trial pursuant to notice, neither of which have been paid; and only one of the bills, that on the amendment, tendered, if they can be regarded as having been settled between the parties.

The proceedings therefore of the plaintiff were irregular, and the filing of the amended declaration must be set aside, and all subsequent proceedings.

The difficulty appears to have arisen from the delay of the plaintiff's attorney in proceeding with his cause, and the loose practice that has been observed.

If the plaintiff's attorney in his proposition, during the assizes, on the 14th May, to withdraw the judgment and allow the defendant to plead, had offered to pay the costs for not proceeding to trial upon taxation, if the plaintiff was bound to pay any, I should have made the rule absolute without costs; the defendant having made no affidavit of merits, or shewn that he was not prepared for trial.

*Per Cur.*—Rule absolute, with costs for setting aside the amended declaration and all subsequent proceedings.

#### BEATTY V. McINTOSH ET AL.

Where it is the intention of the parties, by the submission of reference, to settle all matters finally between them; and for that purpose they give the arbitrators power to award upon the conveyances to be made between them—the amount of rent to be paid—and the security to be taken therefor: *Held per Cur.* that an award directing “*all necessary* deeds for granting, &c., and for securing payment of the rent, to be executed,” without stating *what kind* of conveyances, &c., is bad.

Where also a verdict is taken for 1s. in a suit, subject to an award, and the arbitrators do not in their award in any manner dispose of the verdict or suit. *Held*, award not final and bad.

This was an application by *J. H. Hagarty*, to set aside an award between the parties upon various exceptions, the last of which was “that the award was bad for uncertainty, in directing that the plaintiff and defendants should execute all necessary deeds, for granting the right and privilege to overflow the plaintiff's lands, and securing the payment of the annual rents, without specifying what deeds and the nature and extent thereof, and certain parties thereto, and also that the said award is not final between the parties.”

Another objection was, that the verdict was in no wise disposed of.

*Mr. Hagarty* cited *Wilson* 168; *Billings*, 147, 160; 9 *Jur.* 203; 5 *East*. 145; 7 *Taunt.* 700; 1 *Marsh*, 238; 2 *D. N. S.* 452.

The plaintiff brought an action on the case against the defendants, for overflowing certain lands of the plaintiff, by means of the erection of a mill dam across a stream of water, on the land of the defendant, below the plaintiff's lands.

At the trial of the cause, at the assizes holden for the Johnstown District, on the 5th day of October last, a verdict was taken for the plaintiff for 1s. damages, subject to the award of arbitrators named under an order of reference, with power to decide all matters in difference in the

said suit, and in relation to the overflowing of the plaintiff's lands by the mill dam of the defendants; and to award the annual value which the defendants should pay to the plaintiff, as well for the past as for all future years, for the right and privilege of raising the water up to a certain mark, made on a certain rock at defendant's mill, as proved by William Beatty, and by the said order of reference it was ordered; "that the plaintiff and the defendants should execute or cause to be executed, all necessary deeds for the granting the right and privilege to overflow the plaintiff's lands as aforesaid, and securing the payment of such annual rent as aforesaid."

Upon this order of reference, the arbitrators awarded among other things, "that the said defendants should pay to the said plaintiff, the sum of thirty shillings, being the amount of the annual value, at the rate of five shillings per year, for the overflowing of the plaintiff's land, by the mill dam of the defendant, from the first day of July, 1840, to the first day of July, 1846; and that the defendant should pay to the plaintiff yearly and every year thereafter, on the 1st day of July in each and every year, the sum of five shillings, for the right and privilege of raising the water two feet five inches perpendicularly up to the mark made on a certain stone, in the north end of the said mill, being a grist mill of the said defendants, three feet six inches from the north-east corner of the said mill, which mark is made thus "⊥" as proved by William Beatty, and thereby causing the said water to overflow the said plaintiff's land, on lot No. 14, in the 4th concession of Yonge, to the extent that it may cause the same to be overflowed, in consequence of having the said water raised by the said mill dam of the said defendant, to the said mark or height of ten feet five inches;" and further "that the said plaintiff and defendant should execute or cause to be executed, all necessary deeds for granting the right and privilege to overflow the plaintiff's land as aforesaid, and securing the payment of the said annual rent as aforesaid."

*Richards* and *Phillips* shewed cause, and cited 9 A. & E. 576; 12 M. & W. 562; 4 M. & W. 432; 5 Dowl. 442; 1 M. G. & S. 132.

JONES, J.—The arbitrators were bound to settle the matter in dispute finally, not only by awarding the amount to be paid as annual rent for the past, but what sum should be paid annually for the future, and to settle the deed by which the plaintiff should grant to the defendants the privilege of overflowing his land, as also the manner in which the defendants should secure to the plaintiff the payment of the annual rent awarded to be paid by the defendants to the plaintiff, in all time to come.

It is contended by the defendants, that the arbitrators exceeded their authority, in directing that all necessary deeds should be executed, and having only power to ascertain the amount of rent to be paid annually; and that therefore that part of the award which relates to conveyances and securities, not being within the submission, and therefore bad, may be rejected, and then the award in other respects being good, can be allowed to stand.

It appears to me, that the intention of the parties by the submission, was to settle all matters finally between them, and that the arbitrators were bound to award conveyances, and therefore necessarily the kinds of conveyances, and the security for the payment of the rent.

How is the nature of the conveyance in its form to be settled, or how

the plaintiff to be secured in the payment of his rent? These are matters unsettled, and therefore the matters referred are not finally determined.

The case of *Tundy v. Tundy*, 9 D. P. C. 1044, is an authority to shew the award bad in this respect.

Nor does the award in any manner dispose of the verdict or suit; the verdict was for 1s. damages for the plaintiff, subject to the award of the arbitrators.

They do not confirm the verdict, nor do they reduce or annul it; increase it they could not, as is settled in the case of *5 East.*, 143; *Bonner v. Charlton*.

The award is therefore not final in that respect, no judgment can be entered upon the verdict, and therefore the plaintiff cannot recover his costs.

I am therefore compelled to hold that the award is bad, and set it aside, which I do without costs.

*Per Cur.*—Rule absolute to set aside award, without costs.

---

EVERETT V. WHITEFORD.

As to the power of arbitrators under the following submission, to make the award they did.

*A. Wilson*, in Hilary Term last, obtained a rule calling upon *Whiteford* to shew cause why the award made between the parties should not be set aside, because the arbitrators, after having duly adjourned their sitting to afford the parties a further opportunity to appear before them in the said matter, returned, and in the presence of the said *James Whiteford* or his attorney, and in the absence of the said *Everett* and of any one on his behalf, and without notice to the said *Everett*, or any one for him, of their intention so to sit and dispose of the matters before them between the parties, and before the day or time appointed in the said adjournment for their meeting again, held a meeting and decided on the matters between the parties; and because the only trespass proved or alleged before the arbitrators, was in respect of the said *John Everett's* entry on the land of which possession was delivered by the Sheriff under a writ of possession, the same writ of possession being a full justification to the said *Everett* for that purpose, and because the said award is inconclusive and does not determine the title to the land according to the submission.

*Ross*, of *Belleville*, shewed cause.

The facts of the case were these:

*Whiteford* being in possession of a piece of land claimed by *Everett*, the latter brought an action of ejectment therefor.

*Whiteford* entered into the consent rule, describing the premises for which he intended to defend.

*Everett*, conceiving the description did not cover the land in question, entered judgment by default against the casual ejector; sued out a writ of *habere facias possessionem*, and took possession of the land.

*Whiteford* conceiving the land to be his, and covered by the description in the consent rule, brought an action of trespass against *Everett*

for his entry on the land under the writ, and Everett brought an action for the mesne profits against Whiteford.

The two suits were carried down for trial at the last assizes for the Victoria District, when it was agreed between the parties, by mutual bonds, to submit the title to the said land and the suits in question, and all matters in difference, to the award and determination of Charles Otis Benson, James Gerald Fitzgibbon, and John Emmerson; the two first were attorneys and barristers, and the latter a practising deputy surveyor.

The conditions of the bond were, that the parties respectively should "obey, abide by, observe, perform, fulfil and keep the award, order, arbitrament, final end and determination of the said Charles Otis Benson, James Gerald Fitzgibbon, and John Emmerson, or any two of them, arbitrators indifferently named, elected and chosen, &c., to arbitrate, award, order, judge and determine of and concerning the title to the land in dispute above mentioned, and of and concerning the suits above referred to, and also all costs as well of this reference as of the suits now depending."

The award was "that the said John Everett had not any right or title to the land in question between the parties, or to any part thereof, (the same being that piece of land in the town of Belleville, lying on the west side of Front Street, the possession of which was given by the sheriff of the district of Victoria to the said John Everett, in July last, under an alias writ of *habere facias possessionem*, as set forth in the recital of the said bonds), nor had the said John Everett a right to the possession thereof, or of any part thereof, or of the appurtenances, at the time of the commencement of the said action of ejectment, or at any time since." And they further awarded, "that possession of the said premises should be forthwith delivered up to the said James Whiteford by the said John Everett;" and with respect to the said action of trespass for the mesne profits, commenced by Everett, they awarded that he had no cause of action, and that the issues in the said action should be found for the defendant, and finally determined the said cause in favor of the defendant.

The award went on to dispose of the issues, costs and other matters submitted.

JONES, J.—The complaints against the arbitrators and the regularity of their proceedings, are fully rebutted by the affidavits filed on the part of Whiteford, so that it remains only to consider, whether the writ of possession was a justification for the entry of Everett on the land in question, and whether the award is inconclusive in not determining the title to the land according to the submission.

It appears to me that the writ of possession was no justification for the entry on the land in the possession of Whiteford, because the arbitrators have determined that it was not the land of Everett, nor the land for the recovery of the possession of which his action of ejectment was brought against Whiteford, and that he was not entitled to possession.

As to the award upon the title, by the submission, the arbitrators were to determine "of and concerning the title to the land in dispute," &c.



The award is, that "the said John Everett had not any right or title "to the land and premises in dispute between the parties, or any part "thereof."

That is the determination of the title so far as necessary between the parties.

It determines that Everett had no title, and it was immaterial whether the title was in fact in Whiteford, or in any third person; if not in Everett, he had no right to the possession, and committed a trespass in entering upon it.

It appears to me that the award is carefully drawn, and not open to the objections taken.

*Per Cur.*—Rule discharged.

---

#### WILKINS V. PECK.

In the rule nisi to set aside an award, it must be stated that the rule is drawn up on *reading the award, or a copy of it*. The omission of these words is fatal.

*D. G. Miller* obtained a rule, calling on the plaintiff to shew cause why the award of the arbitrators under a rule of reference in the cause, should not be set aside as being contrary to law and evidence, for irregularity and uncertainty in not disposing of the issues in the cause, for surprise in the hearing of the cause by the arbitrators, and for the admission of improper evidence, with leave to file further affidavits.

The defendant did not file any further affidavits till after cause was shewn against the rule.

*Wallbridge*, of Belleville, shewed cause, and objected to the rule, that it was not drawn up on reading the award, or a copy of it, and that there was no reference to it.

JONES, J.—This is a fatal objection.—3 Dow. 549; 5 Dow. 597.

But could this objection have been overruled, the defendant could not succeed in his application, the application on which the motion was made not supporting the objection, and the subsequent affidavits not being filed in due time. Nor do I see that by any of the affidavits the merits of the case are with the defendant.

*Per Cur.*—Rule discharged.

---

## QUEEN'S BENCH.

TRINITY TERM, 11 VICTORIA.

---

Present—THE HON. J. B. ROBINSON, C. J.  
 THE HON. MR. JUSTICE MACAULAY,  
 THE HON. MR. JUSTICE JONES.

THE HON. MR. JUSTICE McLEAN sitting in the Practice Court.  
 THE HON. MR. JUSTICE DRAPER absent in England.

---

## MACKLEM ET AL. V. McMICKING.

Trespass for breaking and entering plaintiff's car-house, *and for seizing and taking rail-cars*, &c. Pleas—1st, not guilty; 2ndly, plaintiff not possessed of car-house; 3rdly, that car-house was the freehold of A., and defendant, as his servant, &c., *broke and entered car-house* and committed the said supposed trespasses in the declaration mentioned; 4th, as to seizing, &c., the cars, and converting them, &c., that they were not the plaintiff's. The jury gave a verdict for the plaintiff on all the pleas *but the 3rd*, and that they found for the defendant; no damages were given to the plaintiff, the 3rd plea being taken to bar the action. *Held per Cur.*, on motion for a new trial, that as the 3rd plea left unanswered the *taking of the rail-cars*, the plaintiff should have had a verdict for nominal damages, and that a *venire de novo* must be ordered, unless defendant would consent to such a verdict being entered.

Trespass, for that the defendant on the 15th of April, 1846, and on divers other days &c., broke and entered a certain building of the plaintiff's called a car-house, &c., and made a great noise and disturbance therein, broke open and spoiled doors and locks, hinges, &c., to the value of 20*l.*, and during the time aforesaid, namely on the said 15th day of April, seized and took the rail-cars of the plaintiff's, then being in the said building, of the value of 200*l.*, and converted and disposed of them to his own use, by which means the plaintiffs were greatly disturbed in the possession of their car-house, and prevented from carrying on their lawful and necessary business therein.

The defendant pleaded, 1st, not guilty.

2ndly, that plaintiffs were not possessed of the car-house in the declaration mentioned.

3rdly, that the car-house was the freehold of the Erie and Ontario Railroad Company, and defendant as their servant broke and entered the same by their commands, and committed the said supposed trespasses in the declaration mentioned.

4thly, as to seizing and taking the rail-cars, and carrying them away and converting them to the defendant's use, that they were not the goods and chattels of the plaintiffs.

The plaintiffs joined issue on these pleas.

The jury found for the defendant on the 3rd plea, and for the plaintiffs on the other issues.

The 3rd plea was pleaded as an answer to the whole count, though it made no mention of the cars.

H. Eccles moved for a new trial, on the law and evidence and for misdirection; he referred to 9 M. & W. 666; Cro. Jac. 865.

W. H. Blake shewed cause, contending that all the pleas went to the whole of the action. If the plaintiff meant to go for the goods alone, he should have new assigned.

ROBINSON, C. J.—The third plea did not in fact deny or justify the taking of the rail cars, and converting them to the defendant's use, but left that cause of action unanswered; it is not alleged in the count as mere matter of aggravation, but is complained of as a distinct and substantial injury.

On the general issue the plaintiff has a verdict, and the only special plea by which the defendant attempts to defend himself against the charge of taking the cars, is found in the plaintiff's favour.

Under those circumstances, we think the plaintiff should have had damages assessed for him, and then if the third plea, having been pleaded as an answer to the whole declaration, (though only in this sense, that it is not in its introductory part confined to a part of the cause of action,) had been found to present a difficulty in the way of the plaintiffs' obtaining judgment for their damages, that difficulty could have been got over by an application to the court for judgment *non obstante veredicto*. Unless the defendant will consent that a nominal verdict be entered for the plaintiff, we must order a *venire de novo*.

JONES, J.—I think the learned judge was wrong in considering the third plea an answer to the whole declaration; the *asportavit* is charged as a distinct trespass, and is answered as such by the defendant in his fourth plea, and upon the finding of the jury on that plea, the plaintiff was entitled to damages.

If the third plea had stood alone upon the record, it would not have answered the whole breach, and would have been demurrable for that reason, as professing to be an answer to the whole.

All that is stated in regard to the car-house in the declaration, after the allegation as to the breaking and entering, is mere aggravation, and is answered in that plea; but the distinct trespass as to the cars is not answered by it. I found this opinion upon the cases following: Douglas 780; 10 Bing. 35; 5 B. & Ald. 220; 1 Bing. N. C. 72; 8 T. R. 299.

This case is very distinguishable from *Taylor v. Cole*, 3 T. R. 292, and many others, where acts complained of as trespasses would be actionable in themselves, and must be justified and pleaded to by the defendant in his defence, but when added to a trespass for breaking and entering a close, or for a battery or imprisonment, they would be regarded merely as aggravation; and in such cases a justification to the breaking and entering, the assaulting or imprisoning, which may reasonably be regarded as the gist of the action, would in general be considered a justification of the trespasses sued for.

MACAULAY, J., concurred.

*Per Cur.*—Rule absolute for a *venire de novo*, unless defendant will consent to a nominal verdict for plaintiff.

## O'REILLY v. MOODIE, SHERIFF.

In an action against the sheriff for the escape of A., arrested on a *ca. re.*, at the suit of the plaintiff, the declaration averred, "that A. was indebted to the plaintiff in a large sum of money, to wit &c., upon and in respect of certain *causes of action, before then accrued* to the plaintiff against the said A., &c." The defendant pleads, denying that A. was indebted to the plaintiff in manner and form as the plaintiff alleged. *Held, Per Cur.* that under these pleadings, the plaintiff would be entitled to recover if he shewed that *any debt* accrued to him against A. before he sued out the writ; also, that it was not open to the sheriff to set up technical objections, in regard to forms of action and points of practice, having nothing to do with the fact of the existence of a debt, which perhaps the debtor A. might have urged in the original suit.

This was an action against the sheriff for the escape of one Rabiere, arrested on a *ca. re.* at the suit of the plaintiff, for 190*l.*

The defendant pleaded, 1st, not guilty.

2ndly, denied that Rabiere was indebted to the plaintiff in manner and form as the plaintiff alleged.

The declaration averred "that Rabiere was indebted to the plaintiff in a large sum of money, viz., 619*l.*, upon and in respect of certain *causes of action, before then accrued* to the plaintiff against the said *Rabiere*," and that he being so indebted, the plaintiff for the recovery of the said debt sued and prosecuted out of the Court of Queen's Bench, &c., against the said Rabiere, a *ca. re.* directed, &c., in a plea of trespass on the case upon promises.

The jury gave a verdict for the plaintiff, and 90*l.* damages.

There was clear evidence of the sheriff's bailiff having arrested Rabiere, and of the escape.

The case turned chiefly on the proof of his being indebted to the plaintiff, and the amount.

Rabiere had been getting out lumber upon an agreement made with the plaintiff in 1840; the arrest was in May, 1846.

The agreement was under seal. Rabiere covenanted in it that he would, in the spring of 1841, deliver to the plaintiff certain quantities of lumber and staves, of qualities specified, and at places named in the agreement.

The plaintiff bound himself "to provide Rabiere with cattle, &c., to be returned to the plaintiff if Rabiere should fall in debt, after having finished and the men's wages paid." And Rabiere further agreed "to pay the plaintiff for whatever provisions or other things the plaintiff should in the mean time supply to Rabiere and his hands." And each bound himself to the other in 1000*l.* penalty, for the performance of the agreement.

The defendant's counsel objected at the trial, that as the process sued out was in trespass on the case on promises, and as the plaintiff could not have recovered in that action for any goods or supplies furnished in pursuance of this sealed agreement, that the plaintiff must fail in this case upon the issue on the plea, which denied that Rabiere "was indebted to the plaintiff in manner and form as the plaintiff hath alleged."

*J. H. Hagarty* moved for a new trial on the law and evidence, and for misdirection; he cited 7 M. & W. 463; 9 Dowl. 256; 2 Stark 42; 7 B. & C. 89; 2 Esp. 477.



*A. Wilson* shewed cause, and referred to 2 N. R. 148 ; Cro. Eliz. 188 ; Cro. Jac. 279 ; 8 Jur. 958 ; 1 G. & D. 381 ; 2 Dowl. P. C. 208 ; Cro. Eliz. 271.

ROBINSON, C. J.—It appeared to me, on the trial, that the issue to be tried as regarded the debt due by Rabiére, was whether “he was indebted to the plaintiff in any sum of money in respect to certain “causes of action before then accrued,” for that is all that the declaration alleges.

It does not state whether he was indebted on specialty or simple contract, or on what account.

The objection then rests only on the fact, that the process on which he was arrested was in trespass on the case upon promises ; and the sheriff calls upon us to consider, that in that action the plaintiff could not have recovered for the advances made under a sealed agreement, and therefore that the allowing the debtor to escape on that process was no damage to him ; but that is assuming that the sheriff may not only put the plaintiff to prove that he has a good cause of action in substance against the original defendant, and such as he declares he had, and that he is further entitled to all the equities in his defence that the original debtor would have been, which the cases cited by Mr. Hagarty do tend to establish ; but further, that he may set up all technical objections in regard to forms of action and points of practice that the debtor could have done, although they have nothing to do with the fact of the existence of a debt, and although *non constat* but that the debtor himself would have waived such objections, or might have been in some manner precluded from urging them.

The plea here, however, it seems to me, does not leave open to the sheriff any objection of this technical kind.

What the jury was sworn to try was, whether the plaintiff had or had not such a cause of action as he had stated in his declaration in this action, that a debt (in other words, any debt) accrued to him before he sued out the writ.

If the sheriff was prepared to shew that the plaintiff had no demand against Rabiére which he could have recovered for in the action brought by him, or if he was disposed to deny it and to put the plaintiff to the proof of it, he should have pleaded to that effect, and then the plaintiff would have known on what it was he rested his defence, and might have been well able to prove that he had a good cause of action against him in assumpsit, on account of the advances made to him, as he might have had in various ways, notwithstanding the sealed agreement produced upon the trial.

In *Rogers v. Jones*, 7 B. & C. 89, Bayley, J., lays it down, that an acknowledgment of the debt made by the debtor, even after arrest, would be evidence against the sheriff, if made before the escape.

Now we are not to assume, when it is shewn that the plaintiff had sold goods and paid moneys to Rabiére, constituting a valid debt, that he was not in a condition to recover for those, independently of the sealed agreement that had existed between them, but which might on various grounds have been no longer available to the plaintiff.

If the plaintiff had failed in any point of his agreement, he might have been compelled to sue in assumpsit, as he might do for any balance

admitted by Rabiére to be due upon a settlement of accounts for goods furnished under it.

In *Parker et al. v. Bloxam et al.* sheriffs of London, where the declaration in an action for false return stated that the debtor was indebted to the plaintiff for goods sold and delivered, Lord Kenyon ruled, that the plaintiff was bound to prove the averment so made; that is, that the cause of action was for goods sold and delivered.

I find no other case bearing so nearly on the question raised here, and the difference between that case and the present is evident. Here the declaration does not aver on what account Rabiére was indebted.

MACAULAY, J.—The issue is not, whether the plaintiff had a good cause of action against Rabiére in *assumpsit*, but whether he was indebted to the plaintiff upon and in respect of certain causes of actions, and this was proved.

The defendant could justify under the writ: it was not void on the face of it.

The affidavit of debt does not appear, and though there may be a variance between the real cause of action and that for which the debtor was arrested, still I do not think it open to the defendant to take such an exception on this issue. The debtor himself might have waived it.

McLEAN, J. concurred.

*Per Cur.*—Rule discharged.

---

KENNY V. COOK ET AL.

In an action on the case for negligent driving, where the fact of negligence goes fully to the jury, and they find for the defendant, and no misdirection on the part of the learned judge at *nisi prius* is complained of, the court, unless it appears that the evidence is conclusive in favour of the plaintiff, will not grant a new trial.

The plaintiff sued in case for negligence.

The defendants were proprietors of a line of stage coaches between Toronto and Cooksville.

The plaintiff complained, that while he was going as a passenger in one of their coaches, by the negligent and unskilful driving of their servant, and in consequence of the coach being overloaded, it was upset, and he was thrown down, and had his left arm broken.

In a second count, he ascribed the injury to the fact that the coach was bad and insufficient, and broke down in consequence.

The defendants pleaded the general issue.

The jury gave a verdict for the defendants.

W. Eccles, of St. Catharine's, moved for a new trial on the law and evidence; he relied upon the coach being overloaded, and upon its not being properly constructed and put together; and cited 2 B. & Ad. 169; 5 Q. B. R. 747; 3 Bing. N. C. 109; 3 Scott. 515.

*Sheffington Connor* shewed cause, contending that in cases like the present, a new trial in the absence of any alleged misdirection on the part of the judge, and under the sort of evidence adduced at the trial, would be entirely without a precedent; he referred to the following authorities, 2 Campb. 79; 2 Esp. C. 533; 3 Bing. 819; 1 C. & P. 414.

ROBINSON, C. J.—The verdict was given in this case against my direction, that is against the tendency of it, though I left to the jury, as I was bound to do, the fact whether the defendants had been proved to their satisfaction to have been guilty of negligence, from which the plaintiff had received an injury.

I supposed that they would have given the plaintiff a verdict for reasonable damages, probably from 20*l.* to 50*l.*

That he had been injured by the upsetting of the carriage, there was no doubt; the fracture of a bone of the arm was an inconvenience to him, though not very painful or very serious; it disabled him from labor for some weeks wholly, and from effective labor in his trade for two or three months, and was besides probably an inconvenience to him for a greater length of time, making it necessary to be more careful than ordinary in using it, and incapable perhaps of exerting the same strength. Still the question was for the jury, whether the accident was attributable to negligence in the defendants.

I cannot say that it was proved that the carriage was over-loaded, or that it was driven recklessly or carelessly, or that there was any want of skill in the driver, or any fault in the horses used.

The carriage, it was sworn, was being driven along the street slowly, when the fore-wheels dipped suddenly into a rut, occasioned by the ground over a drain having sunken a little. The jar occasioned the front seat, on which the driver and two passengers were sitting, to give way. The seat came down upon the horses and frightened them; they ran across the street, and then, suddenly turning up the street, they overturned the carriage and threw off the outside passengers, injuring the plaintiff and others.

There was no clear ground on which blame could be imputed to the driver, or the owners, as far as the conduct of the driver was concerned.

The carriage was an omnibus, had often carried more passengers, and was calculated to carry more than it then had.

It was a new carriage, built about two months before; but it was sworn by one of the passengers, that when he got up on the front seat it did not seem firm, and that he remarked it to the driver, who took no notice of it, merely saying that it would do.

It was proved that the carriage was regularly inspected each day, and had been examined that morning. The agent for the defendants stated that there was no defect outwardly visible in the fastening of the front seat; but that when it came to be examined after the accident, it was evident that it had not been properly secured.

He candidly admitted that it should have been more firmly made fast to the frame of the box than it was, by means of an iron band and by bolts and screws through the posts. He stated that it had given way partly by drawing out the screws and partly by the wood splitting asunder.

I stated to the jury what I considered to be the law in such cases: that the proprietors of a coach taking passengers are bound to have safe and sufficient vehicles, not a new coach for every journey, but certainly one that shall be sufficient for the work to be done, capable of bearing safely what is likely to be required of it.



I remarked upon the alleged defect in the seat, and upon the warning given to the driver, as to which latter point it was singular, that though the driver himself was a witness on the trial, and gave what seemed to be a clear and candid testimony, he was not questioned by either party as to his being told that the seat was unsteady, and so he neither confirmed that nor denied it.

The conduct of the proprietors of the coach towards those who had suffered injury was kind and considerate, and such as did them much credit. They had given money to one man in consideration of the hurt he had received, though he had not asked or expected it, and swore that he did not think them to blame for the accident, and his injury was more serious than the plaintiff's.

They had sent word also to this plaintiff immediately, to say that if he would come to them they would receive and maintain him till he was capable of working and could get employment. His answer was, that he did not feel that they were to blame, or that he had any claim upon them, but that as they had made the offer he would go.

He changed his mind, however, and returned to his home at St. Catherine's, and was afterwards induced by some means to bring an action; when one of the proprietors went to him there, and offered him 25*l.* and to pay the costs.

He refused that, and persisted in suing. He was about twenty years of age, had been working up to that time chiefly if not wholly as an apprentice to a cooper, and not at wages on his own account; and he insisted on being paid by the defendants for at least three months' time, at the highest rate of wages of a cooper, which he might indeed have been able to have earned, for he was sworn to be a clever active lad and a good workman.

The defendants, being sued, did not pay money into court, but defended the action on the ground that they were not legally liable,—that there was no negligence.

I told the jury that the defendants' having offered 25*l.* was a circumstance to be considered; that it might seem rather ungenerous to take that as a clear proof of their conviction that they were culpable, because it might have proceeded from a kind and liberal disposition, and from a wish to leave no apparent ground for dissatisfaction, which might be injurious to their business; and they were certainly not the less entitled, when forced into a law suit, after every reasonable effort to settle, to contest the point of negligence fully on the law and the fact.

I said at the same time, however, that the fact of making the offer was no doubt evidence, and strong evidence, to lead to the conclusion that the defendants felt they had something to answer for.

With such remarks the case went to the jury, and they found a verdict for the defendants.

It is not our inclination, under such circumstances, when no misdirection is complained of, to put the defendants a second time upon their trial.

If the jury had given the plaintiff a verdict with heavy damages, it is not likely that we should have relieved the defendants; and now, when the plaintiff would persist in driving his legal remedy to the uttermost, while the defendants shewed every inclination to do voluntarily whatever



he could reasonably expect, he should be left, I think, to abide by the result of the consideration which the jury, who are good judges of such matters, have given to the case.

The case of *Christie v. Griggs*, 2 Campl. 79, is much like this in its circumstances, as in its result. *Bremmer v. Williams*, 1 Car. & P. 414, is also one of the same description, in which a very strict rule was applied in favor of the plaintiff, with the concurrence of the jury; as was also done in *Sharp v. Gray*, 9 Bing. 457.

There are cases which would have strongly supported a verdict for the plaintiff in the present case. In the defendants' favor could only be urged the positive evidence of the plaintiff's own admissions, that the injury arose purely from an accident, and the opinion of other passengers to the same effect, and the conduct of the defendants afterwards in desiring to save the plaintiff from loss; if that could fairly be allowed any influence upon the verdict.

All things being considered, I think the result is not unjust, and that we are not called upon to interfere; the question being one in which the jury were very competent to decide.

MACAULAY, J.—I should have been better satisfied with a verdict for the plaintiff, for I think the evidence was calculated to shew either that the carriage was overloaded, or that it was insufficient in point of strength in that part of the work which supported the driver's seat.

The latter was perhaps the real cause of the accident, and being a latent defect not easily perceived by mere external inspection, the defendants are according to some of the cases liable to answer for the consequences of such imperfection; still it is a ground of action sustainable rather on implied than express negligence; and unlike cases in which accidents have happened through the neglect or incapacity of the driver, or the vice or insufficiency of the horses, or owing to defects in the carriage which ordinary or careful inspection might have detected, and which ought to have been noticed and remedied.

Upon the whole, therefore, considering the peculiar nature of the apparent causes of the plaintiff's misfortune, (a) I concur in refusing the rule.

MCLEAN, J., concurred.

*Per Cur.*—Rule nisi for new trial discharged.

---

#### NEESON V. EASTWOOD ET AL.

In order to postpone a prior deed on account of non-registry, evidence must be given at the trial to shew the title a registered one before the prior deed was given.

The second clause of the Registry Act does not apply to deeds given to trustees for the benefit of creditors.

Trespass *quare clausum fregit*; the declaration described the premises as Lots Nos. 6 and 7, on the east side of Castle Street, in the liberties of the City of Toronto, being part of Park Lot No. 2 in the first concession from the Bay, in the township of York.

The defendant pleaded, first, general issue.

---

(a) 3 Bing. N. S. 109; 7 A. & E. 265.

Second, plaintiff not possessed.

Third, justification under license given to them by W. H. Boulton and Clarke Gamble, whom they averred to have been seized in fee of the premises, and gave colour by alleging that the plaintiff entered and committed trespasses under pretence of a deed given before to him, by Messrs. Gamble and Boulton, placing incumbrances on the soil, which the defendants removed as they had a right to do.

Fourthly, justification under leave and license from Henry Scadding and Colley Foster, giving color to plaintiff as entering under a supposed grant from Messrs. Scadding & Foster.

The plaintiff replied, denying the seisin of Messrs. Gamble & Boulton and of Messrs. Scadding & Foster.

The plaintiff claimed under a title made to him by Henry Latham, and he proved at the trial that one John Scadding, whose right to convey was not disputed, on the 15th of August, 1839, made a deed of bargain and sale to him of these lots 6 and 7 on Castle Street, and other lands, to hold in fee simple, for a consideration expressed of 300*l*. This deed was registered on 28th January, 1840. On the 4th of October, 1844, Henry Latham conveyed these two lots to the plaintiff, Neeson, by bargain and sale, registered on 10th October, 1844.

The defendants had entered on these two lots thus conveyed, and ran a road through them, which they claimed a right to do by permission of the Rev. Henry Scadding and Mr. Colley Foster, whose title they set up in opposition to that of the plaintiff.

They produced and proved a deed of bargain and sale made 17th August, 1839, by John Scadding, to the Rev. Henry Scadding and Colley Foster, Esq., and registered 20th of August, 1839, in which it was recited that the grantor, John Scadding, was indebted to several persons named in a schedule annexed to the deed, and that being unable to pay them, he had proposed and agreed to assign all his estate, real and personal, and all his goods and chattels, to the grantees, in trust for the benefit of his said creditors; and in pursuance of that agreement, and in consideration of five shillings paid, &c., he the said John Scadding granted, bargained and sold to his trustees, Henry Scadding and Colley Foster, certain parcels of land, which are all particularly specified in the deed. Among these parcels, he conveyed part of Park Lots Nos. 1 and 2 in the liberties of the city of Toronto, in the first concession from the bay, in the township of York, containing *by admeasure-ment ninety-four acres more or less*.

He did not in any way more particularly describe what portion of these Park Lots 1 and 2, or either of them, was embraced within the ninety-four acres which he thus intended to convey.

By the same deed he assigned all his goods, furniture, securities, book-debts due to him, &c., which were in part enumerated in a schedule annexed; and it was declared that the grantees were to hold the *said* lands, &c., in trust, to sell or lease such portions of them as they might think fit, and to apply the purchase-mones and rents to be received, after reimbursement of the charges of the trust, in paying the debts mentioned; and to pay over the surplus, if any, to the wife of the grantor, John Scadding, during his life, and after his death to his executors or administrators.

The deed contained also a clause giving authority to the trustees, as attorneys of the said John Scadding, to lease the *said premises therein-before mentioned* to such persons and upon such rents as they might think fit, and to execute leases for the same in his name or otherwise; and in like manner, upon absolute sales of the said lands, to execute and deliver in the *name of said John Scadding* or otherwise, deeds and conveyances for the same.

On the 27th January, 1840, by deed of bargain and sale, registered 11th February, 1840, John Scadding reciting that some of his real estate had been unintentionally omitted in the former deed of trust, and that there were in law other creditors besides those specified in the former schedule, whom he also wished satisfied, conveyed certain other parcels of land specified in the deed, and also all and singular his other lands in the province of Upper Canada, not comprised in the former indenture, upon trusts similar to the last, for the benefit of all his creditors.

The defendants were allowed to call witnesses, for the purpose of proving that John Scadding, when he made the deed of 17th August, 1839, did in fact own such parts of lots 1 and 2, as embraced the two small lots mentioned in the declaration, but whether he did not own much more of those lots than would make up ninety-four acres was not shewn, nor was it attempted to be shewn what ninety-four acres, in case he owned more, he intended to convey by that deed.

The reception of any parol evidence to explain the ambiguity was objected to.

No evidence was given in support of the third plea.

The learned judge held that upon the issue joined on the fourth plea, nothing was in question but the title of Messrs. Scadding and Foster, the license from them to the defendants not being denied.

The jury found, that by entering and making the road, the defendants had committed damage to the amount of 3*l.*, and that if the road were to continue to be permanently taken from the plaintiff's land the damage to him would be 25*l.*, and by consent it was referred to the opinion of the court, whether the plaintiff's title or that of Messrs. Scadding and Foster was entitled to prevail, the verdict to be entered accordingly upon the several issues under the direction of the court.

*Alex. Phillpotts*, for the plaintiff, contended that the title of the trustees could not prevail against the plaintiffs. 1st. Because it was uncertain what ninety-four acres of Park Lots 1 and 2 the deed of the 17th August, 1839, was intended to convey; and therefore that it could not be shewn that either of these small lots 6 and 7, which form part of Park Lot No. 2, was conveyed by that deed. 2ndly. Because the deed of 17th August, 1839, was not to be preferred to the prior deed of 15th August by reason of its being first registered, the trustees who are grantees in that deed not standing in the situation of "purchasers or mortgagees for valuable consideration." He referred to 3 Preston's Abstracts, 31; Shep. Touch. 249.

*C. Foster*, for the defendants, contended that the title of the trustees ought to prevail over that of the plaintiff, derived under Henry Latham, although the deed to them was executed after that to Latham, because it was first registered, and entitled to priority under the 2nd clause of our Registry Act, 35 Geo. III. ch. 5. As to the uncertainty in the



deed of the 17th August, he referred to the recitals and the whole deed. He also contended there was parol evidence to shew that Scadding had the acre in question when he conveyed the ninety-four acres. He cited 1 C. & J. 90; 3 N. & P. 356; 8 A. & E. 138; 1 M. & S. 299; Ry. & M. 88; 8 D. & R. 549; 1 T. R. 701; 4 Dowl. 93; 2 C. & R. 235.

ROBINSON, C. J.—Any question that there might be under the Registry Act, was not properly raised, for no evidence was given at the trial, that the title to the premises in question was a registered title before the deed to Latham was made.

This defect in the defendant's case was urged in the argument before the court in term, and the defendants endeavored to meet it by alleging that that difficulty was not stated at *nisi prius*, or it could have been at once shewn that the title was then in fact a registered title.

In my opinion, the fact that the title was not shewn to have been a registered one, when the deed to Latham was given, disposes of the case, for we cannot overlook the point, that the clause of the Registry Act relied on has no operation whatever till that is shewn.

It is the foundation of the whole, and before giving any judgment which would have the effect of postponing the prior deed, merely on account of non-registry, we are bound to see that upon the evidence given the registry law applies to the case.

The *postea* therefore can only be awarded by us to the plaintiff, and the verdict must go for 3*l.*, or 25*l.*, according as the understanding of the parties at the trial is to be carried into effect, that is according as the defendants desire to continue the road there or not.

I have no doubt that our judgment must equally have been for the plaintiff, if there was not that defect in the evidence which I have noticed, for it is clear that the second clause of the Registry Act was only intended to protect *bonâ fide* purchasers or mortgagees *for value* against prior unregistered conveyances, and the trustees, while they held the land for the creditors' benefit, were certainly not standing in that situation.

They are not purchasers from him at all; they hold nothing for their own benefit, nor even for the creditors, until the latter have in some measure become parties or privies to the arrangement, ostensibly designed to secure them.—2 Milne & Keene, 492.

Indeed the language of the deed, (though it is too inconsistent in that respect to lay much stress upon, as proving the intention of the bargainer), tends to shew that Mr. Scadding imagined he was merely in effect constituting the trustees his attornies, to sell or lease the estate for him and in his name.

It would be repugnant to reason to give such an effect to the registry laws, as to hold that after the owner of an estate had sold and conveyed it to a *bonâ fide* purchaser, he could make a subsequent deed of it, to be held for his own benefit and his own purposes, and by registering that deed, cut out his own vendee; that would be grossly fraudulent; the intention and effect of the act is to protect third parties, not to enable the vendor to keep his estate in fact in his own hands, to the injury of his vendee.

It becomes unimportant to speak of the sufficiency of the deed of 17th August, 1839, for passing the small lots of land in question; I apprehend



the defendant's case would fail on that point, also, from want of certainty in the description, and from the impossibility of aiding that by any presumption that could be raised, that the grantor must have meant these two small lots to form part of the ninety-four acres, when two days before he had expressly and clearly included them in a conveyance to another party.

MACAULAY, J.—The creditors of Scadding not being parties to, or having acceded to, or adopted the conveyance to Messrs. Scadding and Foster in trust for their benefit, it was a mere voluntary or gratuitous assignment made by the debtor for his own convenience, and did not constitute a conveyance for *value* within the meaning of the Registry Act, so as to render the previous conveyance to Latham void for want of prior registration; besides it does not appear that at the time Scadding conveyed to Latham, he held under a previously registered title, without which the statute would not apply.

In addition to this, there is no sufficient evidence to shew that the one acre of land conveyed to Latham, was included in the subsequent deed to Scadding and Foster. The latter is for part of Park Lot No. 2, ninety-four acres more or less; whether Scadding owned ninety-four acres, or what quantity, exclusive of the one acre in question, does not distinctly appear, and rested solely on the ground of election. I should not think it competent to Scadding and Foster to elect to take this one acre as within the scope of the conveyance to them, because no intention to convey it to them appears; the intendment would be to exclude it, and under such circumstances, I apprehend the prior conveyance to Latham cannot be defeated as fraudulent or void under the Registry Act, merely by force of an election exercised by the parties to the subsequent conveyance, which does not profess to include it, or to define particularly what it was intended to convey.

McLEAN, J., concurred.

*Per Cur.*—Postea to plaintiff.

#### CAMERON V. LOUNT.

If a stranger, having no legal process, goes to a defendant in execution, and takes down in his presence a list of his goods, and tells him he must not remove them, and does nothing more, he cannot be sued in trespass.

So, if instead of a stranger, a bailiff under a legal process has so acted, he may have bound the property as against other writs, but he cannot be sued in trespass, as he has neither removed, nor detained, nor handled the goods. The writ of *fi. fa.* and warrant to the bailiff must be proved, or its nonproduction accounted for, in order to charge the plaintiff in the execution with an act of trespass committed by the bailiff.

The plaintiff sued in trespass for taking his goods.

In the 1st count, he laid his trespass on 12th September, 1845, and charged the defendant with seizing, taking, driving and carrying away certain goods of the plaintiff, namely, &c., and keeping and detaining the same from the plaintiff for a long time, whereby the plaintiff during that time lost and was deprived of the use and benefit of his goods, and the same were greatly damaged and spoiled.

In the 2nd count, the defendant was charged with taking on the 1st of September, 1843, certain other goods of plaintiff, and converting and disposing of them to his own use.

The defendant pleaded—

1st. General issue.

2ndly. Leave and license of the plaintiff.

3rdly. Justification under a judgment and *fi. fa.* from the District Court, upon a confession of judgment given by this plaintiff to the defendant and one Mary Smith, and a levy by the sheriff under it.

The plaintiff replied *de injuriâ* to the plea of license; and to the third plea, that the judgment and all proceedings under it were, after the seizure made thereon, set aside for irregularity.

The defendant rejoined, and the rejoinder was demurred to.

At the trial, the only proof of a trespass was, that a bailiff had (on two several occasions) gone out to execute the *fi. fa.*; that he asked and received from the plaintiff a list of goods and stock which he found on his farm—told him that he must not remove it—and took a bond that it should be forthcoming.

He touched nothing—did not remove anything—no injury was shewn to any article, or damage to the plaintiff; and the bailiff never went to sell nor did anything further: no one was placed in possession.

The plaintiff was non-suited.

*C. Durand* moved to set aside the nonsuit. On the first seizure, plaintiff was obliged to give a bond for the things, or he could not have retained them: that was a trespass. He cited 3 A. & E. 701; 12 L. J. 41; 1 M. & S. 711; 8 B. & C. 456; 2 Bl. 973; 1 Str. 636; 10 A. & E. 503; 9 B. & C. 591; 5 Co. 14; 11 Co. 82; 3 T. R. 37; 3 Wilson, 336; 3 Step. N. P. 2630, to shew that the facts of this case might constitute a trespass on the part of the defendant.

*A. Wilson* shewed cause. He contended that under the pleadings plaintiff could only prove one trespass, and that in that respect the plaintiff was allowed to take an irregular course at the trial, which of itself was a sufficient reason for not disturbing the nonsuit. The nonsuit, however, was quite right; as it was clear an action of trespass upon the evidence would not lie even against the bailiff, certainly not against this plaintiff, when no sufficient proof was given to connect the plaintiff with the acts of the defendant.

ROBINSON, C. J.—I did not consider that a trespass to the goods was proved, and so ruled, when the plaintiff consented to be nonsuited, though he contended against the ruling, and is therefore in a situation to move against it here.

My opinion is still, that no act of trespass was proved—and certainly none for which this defendant was responsible; for no writ was proved, and though a warrant was spoken of, it was not proved, nor produced, nor its non-production accounted for; and if it had been proved, that alone could not have affected this defendant.

With respect to the first visit made to the plaintiff, the defendant it seemed was informed of it, and said he had no objection to shew lenity.

When told of what was done two years afterwards (in 1845), he disclaimed having anything to do with it.

If the first expression was an adoption of the bailiff's act, what did it adopt? his act under colour of a certain process, but what process? that we cannot legally know without seeing the process which the constable had—we can receive no vague verbal account of that, without such proof of the loss of the writ as would let in secondary evidence.

Then what was done? The goods were not touched or removed—words alone cannot make a trespass to goods, giving a claim for damages as for direct injury to the things themselves.—*Swain v. the Earl of Falmouth*, 8 B. & C. 456, was an action on the case.

Upon the plea of general issue, and the plea of license, which alone were the issues, the defendant stood in no other light at the time than that of a wrongdoer.

If a mere stranger having no process, or which is the same thing, no legal process, had gone to the plaintiff and taken down in his presence a list of his goods, and had told him he must not remove them, that would certainly have been no trespass to the goods.

If the bailiff had a legal process against them, enough might have been done to bind the property as against other writs, and to entitle the sheriff afterwards to sell; but yet there had been no actual, direct injury done to the plaintiff's goods, for which he can sue in trespass—they were neither removed, nor detained, nor handled.

It does not appear to me material to enquire, whether the plaintiff, on the record as it stood at the trial, could or could not give more than one trespass in evidence; for the fact he gave evidence of was, that in respect to which alone there was any pretence to say that the defendant had adopted it, or was shewn to be in any manner liable for it.

MACAULAY, J.—If there was a trespass, I do not see that the defendant is connected with it by sufficient proof, so as to render him legally responsible therefor. The only evidence to implicate him was, that the witness (a bailiff of the sheriff) had a warrant (not produced or proved to have been lost or destroyed, so as to excuse its non-production), in which warrant the defendant's name was mentioned as a plaintiff; and that, when informed of the alleged levy, he repudiated the transaction.

There is no proof that he had anything to do with the suit, if there was one, or the execution if any had issued; and on this ground I think the evidence insufficient. I allude to the second levy, *i. e.*, in 1845; for I apprehend that, under the pleadings, the plaintiff is confined to trespasses committed under the writ mentioned in the third plea, though he might prove two distinct acts of trespass thereunder. I do not think it open to him to prove other trespasses at other times, and on other occasions, than under such writ; because the jury was to assess contingent damages on the demurrer to the rejoinder to that plea; and being pleaded to the whole declaration, the defendant was entitled to restrict the proof to acts of trespass which it covered. Had the plea been traversed, and an issue been raised under the plea to the country, the effect would have been the same.

Upon the evidence, and under the general issue, the bailiff must be looked upon as a wrongdoer; and as a wrongdoer, I do not think the evidence, though it might sustain an action for trespass *quare clausum fregit*, sufficient to prove a trespass to the goods. Mere words naming different articles of personal property, noting them on a paper or list, and saying they were levied upon or seized, without proof of any legal authority, nothing being touched or removed or taken out of the owner's possession, would not, I apprehend, constitute a trespass, or sustain the allegation that the party *vi et armis* seized, took and carried away the same.



I think, therefore, the nonsuit was right. I do not see that it was wrong: without which it ought not to be set aside.

McLEAN, J., concurred.

JONES, J., having sat in the Practice Court during the argument, gave no judgment.

*Per Cur.*—Rule discharged.

---

BOULTON v. COOPER.

Where the learned judge at *nisi prius* consents with reluctance, from his connection with the plaintiff, to try a cause, and from a feeling of delicacy merely gives the case to the jury without comment, leaving them to make out the points from the evidence as they can—*The Court*, though the evidence may be very conflicting, if they see that the plaintiff has been probably prejudiced by the case not having been left to the jury in as full a manner as it would have been under other circumstances, will grant a new trial, with costs to abide the event.

The plaintiff sued on a promissory note made by the defendant 1st November, 1845, payable to the plaintiff or order, for 15*l.* 15*s.*, on 1st May following.

The defendant pleaded, first, that before the note was made it was agreed between the plaintiff and the defendant, that the plaintiff should convey to the defendant 150 acres of land in Moulton, and that in consideration thereof, the defendant should convey to the plaintiff 200 acres of land in Adjala, and should give also to the plaintiff his promissory note for 15*l.* 15*s.*, payable on the 1st May then next; that in pursuance of the agreement, the defendant made and delivered to the plaintiff the note sued upon, and then offered and hath always since been ready and willing to convey the 200 acres of land; that the plaintiff hath always refused and still doth refuse to convey to him the said 150 acres of land, although requested so to do, and so the defendant says that save as aforesaid, there never was any consideration for making the note.

He pleaded also, that for a good consideration it was agreed between him and the plaintiff, on the said 1st day of November, that the said note should be, and that the same was then cancelled, destroyed and discharged.

The plaintiff replied *de injuria* to the first of these pleas, and took issue on the second, and the jury found for the defendant on these issues.

H. J. Boulton, Q. C., moved for a new trial, and in the alternative for judgment *non obstante veredicto*, on the ground that the issues found for the defendant did not legally bar the right of the plaintiff to recover.

H. Eccles, and Lawdor, of Niagara, shewed cause.

The argument turned wholly upon the evidence, which is fully stated in the judgment of the court.

ROBINSON. C. J., delivered the judgment of the court.

No affidavits are filed on either side; the matter must therefore be decided upon the evidence given, so far as the merits are concerned, and the amount in question being small, we should not set aside the verdict on any nice balancing of testimony, if the defendant has fairly made out his plea.

On his side the allegation is, that the note was given on an intended



exchange of land, that the plaintiff has repudiated his contract, and refused to give him the land which he was to receive, and yet sues him on the note, for which he has absolutely no consideration.

The plaintiff's allegation is, that if the defendant has not got the land he expected, it is only because he was found to have contemplated an imposition upon him from the first, by conveying to him land which he knew to be worth nothing, but which the plaintiff had not engaged to take unless it should be of reasonably good quality; that he has it yet in his power to obtain the benefit he desired, namely, by acquiring the fee simple of the land in Moulton; by acting honestly up to his engagement, or paying for it money as the person must have done whose right he bought out; that in the meantime he has at all events a consideration for his note in the bargain which he made with McOwen, by which he has become entitled to his improvements, and to the same right which he had of acquiring the land by purchase; and as it was for this advantage, that the defendant upon his agreement with McOwen gave the note now sued upon, as a substitute for McOwen's obligation to the plaintiff for an equal amount, upon a transaction quite independent of the latter agreement, the plaintiff contends that there can be no reason why the defendant should not pay it; that it is just and legal between the defendant and McOwen, whose improvements he holds and whose debt he assumed, and equally so in regard to this plaintiff, who has given up his claim upon McOwen on receiving the defendant's note for the same amount; the question is, whose relation of the matter is consistent with the evidence? and I cannot say the point is clear one way more than the other.

The action is on a promissory note of no large amount, and if the case had gone without disadvantage to the jury, and they had found as they have, although we might have found the evidence preponderate against their verdict, yet if there was testimony that if believed would support the verdict, it is not likely that we would have disturbed it.

But after what we have heard on the argument, and what we read on the notes, as well as in the report of the learned judge who presided at the trial, we cannot avoid feeling that if the plaintiff has law and justice on his side, his cause was most probably prejudiced by an accident.

It appears that the learned judge either inadvertently, or if advisedly, with reluctance consented to try the cause, which from his connection with one of the parties he might have declined doing, but feeling a degree of delicacy under the circumstances, he merely gave the case to the jury without comment, and left them to make out the points from the evidence as they could.

It was a case which, if it were to be disposed of satisfactorily, required to be set in a clear light to the jury, for the effect of the evidence given is not at first sight obvious.

There seems ground, I think, from the evidence, for contending, that all that the defendant bought from the plaintiff was his fee simple estate in the land in Moulton, regarded as wild land, and in the state in which it was when McOwen took it.

The improvements he seems to have bought from McOwen, whom he paid for them, by assuming his debt to this plaintiff.

In that view of the case, the bargain between McOwen and the

defendant is final; neither of those parties can rescind it on account of anything that has occurred between the plaintiff and the defendant, about this part of the bargain.

If the defendant had paid McOwen in money, and was now inclined to throw up the place, he could not insist on McOwen's returning him the money paid for improvements, for the latter might well say to him, If you have taken from Mr. Boulton such an undertaking to take from you land in Adjala, in exchange for the land in Moulton, as will bind him, your remedy is against him upon your agreement, and you will succeed or not according to the merits of the case between you; if you have made no binding agreement with him, that is your own fault.

But still the defendant would be in no worse situation than McOwen stood in, whose right he bought out, that is, he would have the right to purchase on paying the stipulated price, or to enjoy for the term and not purchase. In either case he has the substantial benefit of McOwen's improvements; the evidence does not bring out the case as fully as it ought to have done.

Justice, we think, requires that there should be a new trial, and the costs may abide the event, in order that if the plaintiff shews himself entitled at last to recover, he may have the costs of the last trial.

The question to be decided on the next trial will be, whether it is truly stated by the defendant in his plea, that he gave the note sued on as part of the price of land to be paid by defendant to the plaintiff, or whether he did not give it to him in consequence of the defendant's own agreement with McOwen, and with the intention that it was to be a payment made by the defendant to the plaintiff, on account of McOwen, as a consideration for the lease which McOwen had held, and for his improvements, which it was necessary the defendant should acquire, before he could place himself in a situation to conclude a bargain with the plaintiff for the fee simple of the land.

If the evidence had shewn that the plaintiff had himself bargained with McOwen, and procured him to relinquish to him his lease, and all benefit of his improvements, in order that he the plaintiff might be in a condition to sell the whole as his to this defendant, on such terms as they might agree upon, then it would be right to look on all as one contract between the plaintiff and the defendant; the plaintiff was selling the land as his in its improved state to the defendant, and the defendant was to pay him in part with the land in Adjala, and in part by money for which he gave the note sued upon; and in that case, if he repudiated the contract so far as he was concerned, and refused to carry it into effect, he could not enforce payment of this note, because the note was given in part consideration for the land.

In the other way of viewing the transaction, the note was a mere substitute for McOwen's note that had been given for the oxen, the one being substituted for the other upon an agreement between the defendant and McOwen, in which case, whenever it might be paid to the plaintiff it would be for his oxen that he would be paid, and not for McOwen's lease or improvements, which had not been bought from him, but from McOwen.

It is not clear upon the evidence given at the last trial, how we ought to regard it.

*Per Cur.*—New trial granted, costs to abide the event.

## ANNE COX, WIDOW, DEMANDANT, v. JOHN HAND, TENANT.

Where a writ of summons is taken out by the demandant in dower, against the tenant, to which he appears, and afterwards the demandant issues a grand cape, and serves it upon the tenant, and he fails to appear, and a writ issues to the sheriff on judgment by default against the tenant: The court will not set aside the proceedings, because the tenant appeared to the summons. *Semble*.—If the tenant has a good defence on the merits, he must shew to the court what his merits are.

Dower.—The tenant, by *A. Wilson*, obtained a rule to shew cause why all proceedings after appearance entered by the tenant, should not be set aside, with costs, the demandant having signed judgment on a supposed default of the tenant to appear, when the tenant had in fact duly appeared.

The facts were as follows: the summons in dower was on 22nd Sept., 1845, returnable the last of Michaelmas Term then next, and filed 10th January, 1846.

On the 9th March, 1846, writ of grand cape issued returnable first of Easter Term.

On the 23rd July, common bail was filed and judgment signed.

There seemed to have been an alias summons taken out, returnable first day of Hilary Term, to which the tenant by his attorney entered an appearance on 7th February, 1846.

The service of the alias writ, the tenant swears, was made on him in January, 1846, and after his appearance to it, nothing was served on him, and in July the sheriff went on the premises, and admeasured to the demandant her dower as upon a recovery for want of defence.

The tenant swore that he had a good defence to the action on the merits, not stating what the merits were.

The demandant's attorney swore that having repeatedly searched for an appearance to the summons, and finding none, he took out the writ of grand cape on 9th March, 1845, returnable in Easter Term, which was served on the 29th day of April, on the premises, and the tenant duly summoned thereon to appear to it upon the return.

*Phillpotts* shewed cause, and cited 1 N. R. 309; 5 Dowl. 419; 2 D. 36; 2 C. & J. 55; 2 Dowl. 218; 3 Dowl. 312.

ROBINSON, C. J.—It seems clear that considering the course of proceedings in dower, the tenant has no cause of complaint, and no ground for this motion; the case of *Williams v. Gwynne*, 2 Saunders, 45; 1 Vent. 60; 2 Keeble 450, 551, 605, is in point, (*Ba. Abr. Dower, J.*) There the tenant had appeared at the return of the summons, but nevertheless a grand cape was issued, and it was objected on error brought that the grand cape did not lie but where the tenant makes default in appearance, whereas there it appeared on the record, as was the truth, that the tenant had appeared on the same day that the grand cape recited that he was not in court, which made the record absurd and repugnant; but the whole court said that that could not be assigned for error, because it was only to the disadvantage and delay of the demandant, and not at all prejudicial or hurtful to the tenant, being only the awarding of more process than was necessary.

The tenant, upon the grand cape which was taken out unnecessarily against him, suffered default, was summoned, and had a day in court on which he might have made defence.



The proceedings on writs of dower are grown so obsolete in England, and we are so little familiar with the process and practice here, that I should be unwilling, as the recovery is final, to allow a tenant to be excluded, if it were shewn that he had a defence to urge, of which he has lost the opportunity by any mistake of his attorney, but we ought to see that there is something to be pleaded in bar, which would go to the merits of the action. Unless there is a substantial and meritorious defence, all is right as it is.

MACAULAY, J.—2 Saund, R. 45, (i) shews the defendant might have appeared again, and the objection is only one of *irregularity*, and too late.

McLEAN, J., concurred.

*Per Cur.*—Rule *nisi* discharged.

#### LUNN v. TURNER ET AL.

Trespass to the south parts of *Lots Nos. 14 and 15*, laying an *asportavit* and conversion of a quantity of wheat and straw *of the plaintiff*. Plea.—Leave and license generally. In support of this plea, the defendants proved a deed made by the plaintiff 20th February, 1846, whereby in consideration of 28*l.*, acknowledged to have been received from the defendant Turner, he “bargained and sold” to him, among other things specified, “all and singular twenty acres of wheat then growing and being on the south part of Lot 14, in the 3rd concession of Brantford, and in the possession and occupation of the grantor Lunn, to hold the said twenty acres of wheat to him the said Turner, his heirs, executors, administrators and assigns, forever, without any claim or hindrance of any person whomsoever, and without any account to be thereafter rendered; so that neither the said Lunn, nor any one in his name, should claim or demand any right or interest in the said twenty acres of wheat, or any part thereof, at any time thereafter, but shall from all actions and demands therefor be wholly debarred and excluded; and by the same instrument the said Lunn (the plaintiff) “All the said twenty acres of wheat, with the right of ingress, egress and regress, into, upon and from, the said Lot No. 14, to protect, harvest and remove, the said twenty acres of wheat, at the option and discretion of him the said Turner, his executors, &c., unto him the said Turner, his executors, &c., against all and every other person or persons, shall and will warrant and for ever defend.” Then followed a proviso, that if Lunn should pay to Turner 28*l.*, with interest, on a day named, 20th June, 1846, then the deed should be void. Turner, on his part, covenanted to pay the money; and it was stipulated, until default made, Lunn might enjoy and retain in his possession and use *the goods* and premises above bargained and mortgaged, as aforesaid, unless he should at any time before the day of payment be sued or prosecuted by any other person whatever, in which case Turner was to be allowed to take and enjoy the said goods and chattels as of his own property.

*Held per Cur.*—That the defendants must fail under their general plea of leave and license, the deed giving no right of entry on Lot 15, to a trespass which had not been denied—no general issue being pleaded.

*Semble* : That if they could have derived from their license to enter on Lot 14, a right to enter on Lot 15, as being *necessary*, in order to enable them to enjoy the privilege granted with respect to Lot 14, they should have in a special plea set forth the *necessity*.

*Held also*, that the defendants must fail upon their plea of license, as the license conveyed by the deed was not to enter and take the *plaintiff's wheat*, but to enter for the purpose of taking *the defendants' wheat*, which the plaintiff had assigned to them and which was growing on the plaintiff's land.

*Semble also* : Plea bad; as the license proved was *conditional* and not absolute. There should have been a special plea shewing default in the payment of the money by plaintiff on the day named.



*Semble also* : That the only right the deed gave the defendants was to cut and carry away the wheat of plaintiff. The defendants had no right to enter on plaintiff's land and take the wheat away by force, *after it had been* cut and stacked by plaintiff.

The plaintiff sued in trespass *quare clausum fregit*, charging the trespass in his declaration to have been committed on the 1st day of August, 1846, in a certain close of the plaintiff, in the township of Brantford, describing it by certain abuttals, and laying in this first count an *asportavit* and conversion of a quantity of wheat and straw of the plaintiff.

The declaration contained also a second count, charging the defendants with the taking on the third day of August, 1846, a quantity of wheat and straw of the plaintiff, and converting it to their own use.

The defendant pleaded to the trespasses in the first count, that the defendant Turner and the other defendants as his servants and agents at the said time, &c., by the leave and license of the plaintiff, committed the said several alleged trespasses in that count mentioned.

Second, as to the taking the goods in the declaration mentioned, (which included the goods mentioned in both counts,) that they were not the plaintiff's goods.

The plaintiff replied *de injuria* to the first plea, and took issue on the second.

The jury at the trial gave a verdict for the plaintiff on both the issues, and assessed the damages on the first count at 100*l.*, and on the second count at 50*l.*

The defendants, in support of their plea of license, produced and proved a deed made by the plaintiff 20th February, 1846, whereby in consideration of 28*l.* acknowledged to have been received from the defendant Turner, he "bargained and sold to him, among other things specified, all "and singular twenty acres of wheat, then growing and being on the "the south part of lot 14, in the 3rd concession of Brantford, and in the "possession and occupation of the grantor Turner, to hold the said "twenty acres of wheat, to him the said Turner, his heirs, executors, "administrators and assigns forever, without any claim or hindrance of any "person whomsoever, and without any amount to be thereafter rendered, "so that neither the said Lunn nor any one in his name, should claim "or demand any right or interest in the said twenty acres of wheat, or "any part thereof, at any time thereafter, but should from all actions "and demands therefor be wholly debarred and excluded;" and by the same instrument the said Lunn, (the plaintiff,) "all the said twenty "acres of wheat, with the right of ingress, egress and regress, into, upon "and from the said lot No. 14, to protect, harvest and remove the said "twenty acres of wheat, at the option and direction of the said Turner, "his executors, &c., unto him the said Turner, his executors, &c., against "all and every other person or persons shall and will warrant and for "ever defend."

Then followed a proviso, that if Lunn should pay to Turner 28*l.*, with interest on a day named, 20th June, 1846, then the deed should be void.

Turner on his part covenanted to pay the money, and it was stipulated that until default made, Lunn might enjoy and retain in his possession and use, *the goods* and premises above bargained and mortgaged as aforesaid,

unless he should at any time before the day of payment, be sued on or prosecuted by any person whatever, in which case Turner was to be allowed to take and enjoy the said goods and chattels as of his own property.

*Vankoughnet*, of Hamilton, moved for a new trial on the law and evidence, and for misdirection, and for excessive damages. He contended that the plaintiff should have new assigned; that an abuse of the license would not make the defendants trespassers *ab initio*; and relied upon the following authorities:—3 P. & D. 7; 3 M. & W. 150; 4 M. & S. 387; Cro. Jac. 220; Willes. 197; 3 T. R. 303; 1 Saund. 30, f. g.; 3 Camp. 525; 1 Chit. Pl. 657.

*Read* shewed cause.—He contended that the deed did not support the general plea of leave and license. It merely gave a right to enter on 14—not on 15. If the enjoyment of that right necessarily included a right to enter on 15, that necessity should have been shewn. The license also was conditional, and not absolute: the plea should have shewn the default by plaintiff in the payment of the £28; for without such default, the deed gave no right of entry. Besides, the plea stated a right to take *plaintiff's* wheat, and the deed only gave a right to take *defendant's own* wheat. The license proved could only have been available under a special plea, making the necessary averments to support the special and conditional license that was in fact given. He relied upon the following authorities: 8 T. R. 50-606; 4 M. & W. 4; 9 A. & E. 448; 9 P. & D. 577; 5 B. & Ald. 220. He was satisfied the court, under the evidence given, would not consider the damages excessive.

ROBINSON, C. J.—The main question at the trial was, whether under the deed the defendants could support their plea of license, and it does not in my opinion admit of a doubt that they could not, either as regards the entry upon the land, or the taking the wheat.

The deed assigned to Turner as his property twenty acres of wheat, growing on the plaintiff's lot 14, to hold to him as his own, and it gave him right of ingress, &c., upon the lot 14, to protect, harvest and remove the said twenty acres of wheat, but the assignment was on condition if Lunn should pay Turner 28*l.*, by the 20th June, 1846, then the deed should be void, and till default made Lunn was to retain possession of the wheat, unless he should be sued by any one else in the meantime.

The defendants rely on the deed by itself, without more being pleaded or proved, for conveying a plain license to enter on 1st August, 1846, and take the wheat.

But first, the defendants not denying that they trespassed on Lot 15, for there is no general issue pleaded, shew only a license of ingress and egress on and out of 14, which gives no right of entry on 15.

It was shewn that they did in fact trespass on 15, and if they could have derived from the license to enter on 14, a right to enter also on 15, as being necessary in order to enable themselves to enjoy the privilege granted with respect to 14, they should by their plea have set forth the necessity; as it is, they undertake to shew a direct and express license from the plaintiff to enter on lot 15, as well as on lot 14, and they did not shew it.

Secondly, the license conveyed by the deed was not to enter and take

the plaintiff's wheat, which is the wrong he complains of, but to enter for the purpose of taking the defendant's own wheat, which the plaintiff had assigned to him, and which was grown on the plaintiff's land; so the defendants do not prove a license to commit such trespasses as the plaintiff complained of, and as the defendants have not denied.

Third, the deed only in my opinion gives license to Turner to enter on lot 14, for the purpose of cutting and *carrying away twenty acres of his own wheat there growing*, and it is set up as a license to enter on lots 14 and 15, for the purpose of carrying away wheat admitted by the plea to belong to the plaintiff, and after the plaintiff himself had harvested and removed the wheat, and stacked it on his own land; it might as well have been pleaded as authority for entering and taking it from the plaintiff's barn, if the plaintiff had stored it there.

The whole object of the license, so far as the deed conveyed any, was to enable the defendant Turner to do that which Lunn afterwards did himself, namely, cut and carry away the wheat.

If Lunn unfairly anticipated Turner, and harvested the crop which the latter was ready and intending to harvest, then he violated his agreement; and after he had cut and stacked it, Turner could have trover, if he refused to give it up to him when demanded, for all that was grown on the twenty acres of 14 was Turner's, and of course trover would lie for it as it stood in the stacks on the plaintiff's land, but Turner had in my opinion no right under the deed to enter on the plaintiff's land and take it by force after it had been cut and stacked by the plaintiff; and clearly, as to all the wheat that had grown on lot 15, he had no colour of right for taking it, and yet he did take it and appropriated it to his own use, the other defendants assisting him.

The case on the plea of license would be subject to another doubt, if there were not these objections, which are clearly in themselves fatal to the defence.

The license to cut and harvest the twenty acres of lot 14, was not absolute but conditional, for the wheat was to remain in Lunn's possession until default made.

The day when payment ought to have been made was passed before the defendants took the wheat, but whether there had been default in paying the money is not stated in the plea; if there had been default, then the title of Turner, which was before conditional, had become absolute, and the wheat was *his* and not Lunn's, and the plea should have been framed accordingly.

If there had been no default, then there was no right to enter or take anything.

In general, no doubt, it is for a party who has made payment to shew it, but he is first charged with not having paid, and the money is presumed to be unpaid unless he proves payment; but here, where non-payment induces a forfeiture, it is at least I think necessary to be asserted in a plea which claims a right under the forfeiture; the license was not as pleaded, to enter on lots 14 and 15 and take the plaintiff's wheat, but was a license to enter on lot 14, and take wheat belonging to the defendant Turner there growing, provided 28*l.* with interest, should not be paid by a certain day; and it was necessary, in my opinion, for the person relying upon the license to state that that fact had occurred



which was the clear condition of the license, and without which he had no such right.

The defendants' counsel contends that in respect to the objections taken to the license, the plaintiff should have new-assigned or replied excess, but that is only necessary where the principal trespass complained of is covered by the license, and the grievance is only in the manner of using the permission.

Here I think the proof failed totally.

With regard to the damages being excessive, which is one ground of the rule for a new trial, I do not think that we can properly interpose on that ground.

The jury, upon a direction distinctly and carefully given, as appears by the learned judge's notes, have estimated the damages at 100*l.*, in regard to the taking the wheat which grew on lot 14, and at 50*l.* in regard to wheat grown on lot 15.

There was evidence to warrant that estimate; the act was done in a high-handed manner, with force and in an oppressive spirit; for in the cause tried just before that, between the same plaintiff and the defendant Turner, the facts appeared which formed the foundation of Turner's claim, and if the jury who tried the cause heard the evidence, as we may suppose some of them must have done, it would naturally incline them to look upon Turner's conduct in the whole transaction as unjust and unreasonable, and it really was so.

The very agreement in this case shews, that for a loan of 28*l.* made to Lunn, he took this security upon twenty acres of wheat, at the same time having received other property also in security, and upon failure to pay at the day, was resolved to take the whole crop to himself, without regard to its value as compared with the small sum he had lent; he thought his agreement put that course of proceeding in his power, and seemed resolved to push his supposed advantage to the utmost. Whether unintentionally or not, he greatly exceeded any right he could have had, for he took much wheat that he clearly had no pretence of claim to, and thus laid himself open in trover.

Unless the verdict given against him were altogether outrageous in amount, he ought to be left to abide the consequences; the manner in which he proceeded to assert his supposed right, founded as it was on an extremely hard transaction, was such as ought to be discouraged, for it was violent and with strong hand, and was likely to have led to a dangerous breach of the peace.

If the jury has so dealt with it as to make this case a warning to the defendants and others, not to take the law into their own hands, it will be a salutary lesson, and it is besides to be considered, that a jury at the preceding assizes had estimated the plaintiff's damages at 125*l.*, not much less than the present verdict, and the additional sum now given, may be reasonably accounted for from the fuller manner in which the transaction was proved upon the last trial.

MACAULAY, J.—Authorities must be strictly pursued, and admitting the bill of sale to be sufficient evidence to prove a license to enter on lot No. 14, and take the wheat thereby sold to the defendant Turner, still it was a license to enter and remove wheat of the defendant's, not wheat of the plaintiff's, to justify which it is according to the frame of the plea,

pleaded; it is a question whether the license, according to the bill of sale, should not have been specially pleaded, being a conditional not an absolute authority, such condition being the non-payment of the debt secured on or before the 20th day of June, 1846; in reply to such a plea, the plaintiff might by affirming payment have taken issue upon the defendants' denial of payment, according to the terms of the instrument; at all events I cannot satisfy myself that a general plea of leave and license to a count in trespass for entering the plaintiff's close and also taking the plaintiff's wheat, is proved by a qualified or conditional license to enter and take the defendants' own wheat. Nor do I see that the entering upon No. 15 is justified under the plea and evidence.—See 2 D. & R. 714; 11 A. & E. 34; 2 A. & E. 485; 1 Saund. 299, (6).

McLEAN, J., concurred.

JONES, J., gave no judgment.

*Per Cur.*—Rule discharged.

#### JACKSON V. SIMPSON.

The plaintiff, a schoolmaster, sued the defendant for a libel, and laid as its consequence, by way of special damage, his dismissal from his school; whereas it appeared at the trial that the real effect of the libel was to prevent his being examined by the superintendent, with a view to his qualification to receive a renewed certificate—the plaintiff applied to the judge at *nisi prius* to amend his special damage to meet the evidence, which the learned judge allowed.—*Held, per Cur.*, on motion for a nonsuit, that the judge at *nisi prius* had power to make such an amendment.

Plaintiff sued in case for a libel, and in three counts of the declaration for slander.

In the first count he set out that he was a schoolmaster, and held a situation as such, and that the defendant maliciously, in order to injure him in his business, published the libel complained of, which imputed violent conduct to the plaintiff, putting a pistol to a man's breast, and threatening to shoot him.

The second charged him with speaking words to the same effect, and with the same malicious intention.

The third and fourth counts laid the words a little differently, and the declaration laid a special damage resulting from all the injuries complained of, viz., that the plaintiff had been injured and damnified in his business of schoolmaster, and was dismissed from his employment as such, and had lost and been deprived of a situation which he had previously held as a schoolmaster, and had lost great profits, which would otherwise have accrued to him in the said employment.

The defendant pleaded not guilty.

Secondly, to the first count the truth of the justification. To which the plaintiff replied *de injuria*.

There was evidence given on the plea of justification, but contradicted.

The jury found generally for the plaintiff and 30*l.* damages.

It appeared by the evidence of the superintendent of schools, that it was not true that the plaintiff had been dismissed as he alleged, that he had been employed in 1844 and 1845, and was in fact employed also in

the same school in 1846 and taught there, but lost the government allowance because the witness would not give him the certificate necessary for enabling him to draw it, and he stated his reasons to be partly his dissatisfaction at the plaintiff, for not improving as he expected him to do during the time of his employment, which he had excused, but not to the witness' satisfaction.

He said he believed he should nevertheless have examined him, and given or refused the certificate according to the result, if it had not been for a letter which the defendant addressed to him, and for statements he had made to him verbally, such as those charged in the declaration.

The defendant had children attending the school, and whether he made his statements to the superintendent *bonâ fide* as a parent, or maliciously for the mere purpose of injuring the plaintiff, was submitted to the jury.

In the course of the trial it was objected, the special damage was not proved as laid, for that the plaintiff had not been in fact dismissed from his school as averred, but the injury, if any, was his not being examined and obtaining his certificate, and losing the government allowance as a teacher in consequence.

The plaintiff prayed leave to amend in this respect, which was objected to as beyond the discretion of the court; but it was allowed, subject to be reversed by the court above; and leave was reserved to move to enter a nonsuit, if the amendment should not be allowed.

*Thomas Galt* moved accordingly.—He referred to the act 7 Will. IV. chap. 3, and contended that under the 15th section, the amendment in question was not one within the discretion of the judge at *nisi prius* to allow.

*R. O. Duggan*, of Hamilton, shewed cause.—He relied upon the following authorities as shewing the amendment within the discretionary power of the judge.—1 M. & Rob. 35, 442; 2 M. & R. 13; 9 C. & P. 718; 9 Dowl. 40; 5 Bing. 240; 8 Dowl. 272; 6 M. & W. 549.

ROBINSON, C. J.—We cannot, in my opinion, determine that the amendment was such as the judge at the trial could not allow under the statute.

I know not on what principle we could say it was beyond his power; and that is the only question, for it seems clear that the defendant suffered no injustice or inconvenience from it in his defence, since it was not an amendment of any matter that affected the proof to be given under either of the issues. It did not relate to the words spoken, or to the truth of them; and besides, the first count on which the plaintiff has recovered was for a libel that required no special damage to be shewn; and considering the plaintiff's occupation, and that the jury must have found the libel to have been maliciously published, the verdict was such as might well be rendered on that count alone, upon general grounds and without proof of special damage. But I think the amendment was within the discretion of the judge, and that let in the evidence of special damages according to the fact.

MACAULAY, J.—The cases seem to me to warrant the amendment made, and it could not prejudice the defence.

The amendment was in the special damage sustained in consequence of the defendant's wrongful communication to the district superintendent.



The special damage originally laid, was his dismissal as a teacher, whereas its real effect was to prevent his being examined with a view to his qualification to receive a renewed certificate; this was the substance of the amendment made.

The defences were, first, that the defendant was not guilty; secondly, that it was a privileged communication; and thirdly, that the facts represented by the defendant against the plaintiff were true grounds of defence unconnected with the consequences or special damages to the plaintiff, which special damage, as amended, was shewn in the course of the plaintiff's proof of the publication, and by the same testimony.

McLEAN, J., concurred.

JONES, J., sitting in the Practice Court during the argument, gave no judgment.

*Per Cur.*—Rule discharged.

### ROBINSON V. RAPELJE, SHERIFF.

The court will not grant a new trial upon the ground of surprise, unless in clear cases, and where the grounds are *strong and specific*; if the surprise is the discovery of a witness of whom the plaintiff was not aware at the time of the trial, it must be stated what evidence such witness can give, and generally the witness himself must shew the court on affidavit what facts he can prove.

In an action of trespass brought against a sheriff for seizing the plaintiff's goods, under an execution against the goods of A., *Held, per Cur.* that A. (the defendant in the execution,) was an incompetent witness for the sheriff to prove that he, A., and not the plaintiff, was the owner of the goods.

*Held also*, that a letter written by A. to the plaintiff, *before* any third party had an interest in questioning the right to the goods, was good evidence to go to the jury to shew the footing on which the plaintiff and A. then stood with respect to the goods.

*Seemle*, that the precise point of time at which, upon a trial, particular evidence may be introduced, is a matter exclusively for the judge at *nisi prius* to determine.

Trespass for seizing a quantity of lumber belonging to the plaintiff.

The defendant pleaded—1st. Justification under a judgment and *fi. fa.* at the suit of Van Norman and others against one Tower, averring that the goods belonged to Tower.

2ndly. That plaintiff was not possessed of the goods.

3rdly. Justification under the *fi. fa.* set out in the first plea, averring that the goods were the joint property of this plaintiff and Tower, and that the defendant seized in execution the undivided moiety of the goods as Tower's. Traversing the plaintiff's title as sole owner.

Replication to the first and second pleas; taking issue to third plea, admitting the execution *absque residuo causæ*.

Verdict for the plaintiff, and 178*l.* 15*s.* damages.

At the trial, the case turned wholly on the question, whether under the facts proved, Tower had any legal interest in the goods, or whether they were not the sole property of this plaintiff.

There was no evidence brought to shew that there had been any fraud practised or attempted in order to defeat the execution; and indeed no judgment or execution was proved for the purpose of sup-

porting the second plea; it turned altogether on the nature and effect of the transactions between the plaintiff and Tower.

The defendant called Tower as a witness; but the learned judge, on his being objected to as incompetent, rejected him.

He complained of this rejection, and also that a letter from Tower to the plaintiff was improperly received as evidence for the plaintiff.

*VanNorman* moved for a new trial, for the rejection of legal evidence, the admission of illegal evidence, upon the law and evidence and on grounds disclosed on affidavits; and referred to 4 Taunt. 18; 4 B. & Ad. 410; 1 B. & Ad. 899; 2 C & P. 597.

*D. B. Read* shewed cause, and cited 2 M. & R. 263; 2 B. N. C. 19; 5 B. & Ald. 946; 4 A. & E. 448. As to Tower's being a good witness, he referred to 2 N. R. 331; 1 Bing. 210; 12 A. & E. 442; 1 M. & R. 415; 7 Br. Par. Ca. 177.

ROBINSON, C. J.—With respect to the application for a new trial on the merits, we have very carefully considered the evidence, and feel ourselves bound to say it fully warrants the verdict; and such is the opinion of the learned judge who tried the cause. Nor do we see that there was any thing suspicious or improbable in the transaction, as proved by the plaintiff's witnesses.

It was not shewn that the plaintiff was not in circumstances to purchase the lumber which Tower according to the evidence contracted to sell him, or that there was any thing strange in the plaintiff's making such a contract, which should lead us to doubt that all was done in good faith and according to the ordinary course of business in such transactions.

Lumber of the description in question forms, as we all know, a main article of trade between that part of Upper Canada and the opposite State of New York. It finds a ready market at Buffalo, where this plaintiff was carrying on business, and at profitable prices, and is eagerly sought after. Then what could have authorised the jury, after hearing all the evidence that was given in this case, to find that the plaintiff and Tower had not really such business transactions as those proved. It was positively proved that the plaintiff bargained for the lumber in question with Tower; that it was received by his agent, from Tower, at the mill where it was sawed, was transported under his direction and at his expense several miles to Port Rowan, from whence it was to be shipped to Buffalo for the plaintiff and as his lumber; that it was there under the plaintiff's directions in a yard leased by him for the purpose, and was there under the care and control of his agent, until the defendant came with an execution at the suit of Van Norman, and seized it as being still the property of Tower, but not till after three schooner loads of it had been actually taken to Buffalo, to which all, as it appears, was about to be removed, not clandestinely or suddenly, but openly and deliberately, as the property of this plaintiff; and what is most material, it was proved that the terms on which the lumber was sold were fully agreed upon, and large advances in money made by the plaintiff upon the contract, to as great an amount or greater than he had agreed to do, and sufficient to entitle him under the agreement to all that the defendant afterwards seized.

The letters between the plaintiff and Tower, written during the transaction and before this litigation had arisen, are quite consistent with

the plaintiff's evidence, and corroborate his account of the transaction, and nothing that was material to his case was disproved on the trial.

Confining ourselves to what was proved, as appears by the learned judge's notes, there is no ground on which we could properly disturb the verdict.

Then as to the affidavits filed, they lay no case before us for a new trial on the ground of surprise, or of the discovery of new evidence; great care is required not to open causes that have been fairly and fully tried, upon the allegation of new evidence being discovered, unless in clear cases and where the grounds are strong and specific, such as the finding a receipt or other paper that had been lost and which when produced will be conclusive upon the merits, or the discovery of a witness of whom the plaintiff was not aware, and could not with due diligence have discovered before, and whose evidence bears strongly and directly upon the facts that had been disputed; what evidence such witness would give is expected to be particularly stated, in order that the court may have clear grounds on which to exercise their discretion, and generally an affidavit is made by the desired witness, setting forth what he could testify upon another trial.

Here the allegations are altogether too general; they are just such as could be made always after trial of a fact that had been disputed. There would be no end to litigation, if new trials were granted without anything more specific being shewn, and it would put it in the power always of the losing party, after he had heard all that his opponent was able to prove, to get up a new case supported by evidence hunted up and instructed for the occasion.

The only points, as it appears to us, on which we can have any room for doubt, are the objections that have been raised to the rejection of Mr. Tower, called as a witness by the defendant, and the admission of the letter of the plaintiff, as not being evidence in his own favour; these are both legal exceptions, and must be disposed of on strict grounds.

Mr. Tower was called by the defendant; the plaintiff objected that he was incompetent from interest, because being the defendant in Van Norman's *fi fa.*, upon which the goods were sold, if he could now by his evidence support the sale, by making statements with a view to shew that the property in the lumber had not been legally transferred, as between him and this plaintiff, then his debt is paid through means of the levy, whereas otherwise he would continue liable for the debt, and it would be paid by the application of property which, according to the other evidence in the cause, he had before sold to Robinson the plaintiff, who had paid him its value, if not more.—*Bland v. Annesly*, 2 N. Rep. 331, is cited as a decision directly in point to shew the witness incompetent, and so it is.

There a witness, exactly under such circumstances, was called by the sheriff and rejected, and the court in *banc* without hesitation held him to be incompetent; "he came" they said, "to give evidence, the effect of which would be to pay his own debt with the plaintiff's goods;" they treated him as a witness directly and immediately interested in the event of the cause, so that his situation would not be changed by such provision as is contained in a late statute; no authority is cited for the decision; the case itself has been sometimes spoken of doubtfully, but I



cannot find that it has been over-ruled, and the writers on evidence, of the best authority, recognize the law to be as settled by that decision. Phillips, Starkie and Roscoe, in their Treatises on Evidence, all cite it without questioning it. In *Upton v. Curtis*, 1 Bing. 212, it was relied upon as authority, and apparently acquiesced in by the court, as they decided in accordance with it. Mr. Starkie, in one passage in which he cites *Bland v. Annesly*, observes that "if the judgment debtor would have been liable to the plaintiff, in case of his failure, to the amount of his goods, he would it seems have stood indifferent;" in that case the question of fact was, whether when the witness sold a certain house to the plaintiff, he had contracted to sell the goods with it; if his evidence went to prove that the goods were not included in the sale, if that was the fact, then of course a verdict passing for the sheriff on that ground, did not leave him liable to the plaintiff in the action on any apparent ground.

It is contended, that in this case, if the witness were called to prove that the property in the lumber had not yet vested in Robinson, by reason of their transactions, and if he succeeded in satisfying the jury of that, then that he would necessarily stand liable to Robinson for all the monies which had been advanced to him on account of the lumber which Robinson was to have had, but which would thus have been intercepted by the *fi. fa.* and diverted to pay the witness's debts; but we cannot see that the effect of his evidence would be to shew him certainly liable over to Robinson for the value of the lumber; we cannot tell on what ground he might have proved the lumber not to be Robinson's; it might or might not be on such grounds as would shew him to stand liable to Robinson in as much money as would equal the value of the lumber; his evidence might have been such as to shew he had repaid the advances in money, or by other lumber, or that Robinson on some ground had relinquished his claim to this parcel of lumber; if it had been explained at the trial, that the evidence which Tower was called to give, was such as would confessedly shew him to be liable to Robinson for the whole value of the lumber which had been taken to pay his debt, then there would have been ground for saying that he stood indifferent.

In any such case, I take the question to be, whether upon the statement which the witness himself is called to give, he would stand indifferent; not whether it has been, or can be proved by other people, in that or in future actions, that he would be liable over; the interest in such a case which the debtor has in supporting the levy, is really of the most direct kind, for suppose that when a sheriff comes with an execution, the debtor has at the time in his keeping property which he has only borrowed, or which he has no interest in whatever, he would only have to point it out to the sheriff as his, and pay his debt with it, if he could be received afterwards as a witness to prove that he had bought and paid for it.

It seems to me, that *Bland v. Annesly* was rightly decided, and that this case is within the principle, and not taken out of the rule by anything that is shewn.

As to the objection that was made to the reading in evidence a letter written by Tower to the plaintiff, on 23rd December, 1845, at an early period of the transaction about the lumber, that was evidence relevant to the issue, as shewing the footing on which the parties were

then, in regard to the alleged purchase, before any third party had an interest in questioning it; and as a letter from the plaintiff to Tower had been produced on the other side, the other party could not be justly prevented from shewing in what terms the plaintiff had been written to in respect to the same transaction, before any litigation had commenced, or any suspicion had been suggested.

It is not that everything asserted in that letter is expected to be believed by the jury, or to be taken as proved because it is found there stated, but the fact that such a letter was written at that time by the one to the other, in relation to the transaction which is now in question, is a material fact to be shewn, when the view with which the parties then acted, is the point to be ascertained.

As to the stage of the trial, at which the letter was allowed to be put in and read, I conceive that to be a matter entrusted to the discretion of the judge who presides at the trial, whose object and that of the jury is to get at the truth if possible; we must suppose that, if being introduced when it was, the other party had not according to the general practice an opportunity of remarking upon it, he would not have been denied any indulgence in that respect that might have appeared necessary for the explanation of his case.

Many slight deviations from the general course are sanctioned at trials under the pressure of particular circumstances that arise. Both parties in their turn have need of such latitude occasionally, or the real truth of a transaction would be sometimes shut out from view; such exceptions to the mere course of conducting a trial cannot be made the ground of granting a new trial, unless they have in the particular case led to injustice.

The relevancy of evidence, its legality and sufficiency, are the questions to be discussed after the trial, and not the precise point of time at which it was introduced.

I see no ground on which the plaintiff should be prevented from having the benefit of his verdict.

MACAULAY, J.—If the defendant is to be looked upon as a mere wrong-doer, it may be said that Tower was a good witness, not to prove property in himself in opposition to a possession and proof of a *primâ facie* right in this plaintiff, but to prove that the plaintiff had neither property nor possession, and indeed the right of the plaintiff seemed to depend upon the possession, for he claimed that the goods had been sold and delivered to him by Tower; if so delivered, he was possessed and owned the lumber; if not delivered, the possession remained in Tower; so the first question was, who possessed the lumber; that Tower was not a good witness, treating him as the debtor in the writ of *fi. fu.* under which the defendant as sheriff seized and sold the goods.—See 2 N. R. 351, &c; 1 Bing. 210; 4 Taunt. 18; 4 Bing. 649; 4 B. & A. 412; 1 C. & P. 17; 2 B. N. S. 98; 2 M. & R. 262; 1 M. & Rob. 415; 5 B. & C. 946; 4 A. & E. 448; 12 A. & E. 442; 7 Bro. P. C. 177; 1 B. & Adol. 199; 2 B. & Ad. 594; 2 C. & P. 597; 7 T. R. 480.

As to the equipoise of interest, I am not satisfied that it removes the objection; the direct effect of a verdict in the defendant's favour would be, to justify the defendant in applying the proceeds of the lumber sold by him towards the satisfaction of the execution against the proposed witness, Tower.

As to any counter liability, it is contingent and more remote. Tower is not liable to the plaintiff for the lumber itself, or the value of it, unless indirectly for breach of contract in not delivering all he had promised to the plaintiff; and though he may be liable to an action for money had and received, as upon failure of consideration for any advances he may have received beyond the value of the lumber delivered to the plaintiff exclusive of that in question, still it does not appear unequivocally that any such liability would result from a determination of this suit in favour of the defendant. If this suit fails, his property clearly remains liable to the execution of his creditor, and though the plaintiff may have an action against him for breach of contract, or for money had and received, it is not equally certain that he would. The witness has a more direct interest in one event, than in the other.

I cannot satisfactorily distinguish this case from that of *Bland v. Annesly*; there would seem as much equipoise of interest in that case as in this, and an equality of interest seems to me wanting, when the witness has a direct interest on the one side, not counterbalanced by an interest equally direct on the other.

Any alleged fraudulent assignment is inconsistent with the object for which Tower was offered as a witness. Two defences are set up, a fraudulent assignment, and not possessed, inconsistent in themselves; and Tower was offered in support of the latter. As to the letter, I do not see that it was calculated to affect the case one way or the other.

McLEAN, J., concurred.

JONES, J., sitting in the Practice Court during the argument, gave no judgment.

*Per Cur.*—Rule discharged.

#### O'NEILL v. HAMILTON, SHERIFF OF THE LONDON DISTRICT.

A plaintiff's attorney giving notice to a *sheriff's clerk* that A. & B. are jointly interested in certain goods, and pointing to a deed in his possession which he says shews the joint interest of the parties, and directing the sheriff to sell the joint interest, is not necessarily a notice which will bind the *sheriff* in his execution of the writ.

*Semble*: That the duties of the clerk to whom the notice was given, and the whole circumstances of the case, must be considered, in determining under the notice, the liability of the sheriff.

If the plaintiff's attorney gives at different times two wholly inconsistent notices to the sheriff—*Semble*, that the sheriff is not bound to obey either the one or the other.

*Quære*: What course is the sheriff to pursue upon an execution against the goods of one of two partners, under the circumstances of one being a bankrupt and the other not?

The plaintiff sued the sheriff in case, for falsely returning *nulla bona* to a *fi. fa.* issued at his suit against one Jennings, and endorsed to levy 1276*l.* 19*s.* 1*d.*, with interest, fees, &c.

The declaration was, as is usual, that while the writ was in the sheriff's hands, and before the return thereof, there were goods and chattels of the debtor in the district, whereof he could have levied the amount.

The defendant pleaded—1st. Not guilty.

2ndly. That there were not, at the time of the delivery of the writ



to him, or at any time afterwards and before the return thereof, any goods or chattels of the said Jennings within his district whereof the *defendant had notice*, or could or might or ought to have levied the said monies or any part thereof.

Upon the trial, it appeared that one Lawless had for some time been carrying on business in his own name, as a merchant, and without any knowledge by the public that Jennings, the debtor in the *fi. fa.*, was a partner with him, although in fact articles of co-partnership, it seemed, had been drawn up and executed between them, which were prepared by one A., as attorney for him and Lawless, on the express understanding that he was not to disclose it.

Lawless, in December, 1845, became a bankrupt, and then, for the first time, A. spoke of the partnership; and, as attorney also for the plaintiff O'Neill, put into the sheriff's hands this *fi. fa.* at his suit, two days after the sheriff had seized the goods in Lawless' shop under a commission of bankruptcy, as being the goods of Lawless.

Mr. A. had before maintained that Jennings had no interest in these goods; and when the sheriff, upon some rumour of a partnership between him and Lawless, had been urged by the plaintiffs in other *fi. fa.*'s against Jennings, to seize the goods in question in Lawless' shop, A. had interfered and forbade him, and threatened him with an action if he should seize them on any *fi. fa.* against Jennings.

The evidence was such, as to throw great suspicion on the whole arrangement as between Lawless, Jennings and the plaintiff, as being a contrivance to protect the goods, in either event of Lawless becoming a bankrupt, or their being claimed as liable to the debts of Jennings.

It was left to the jury, by the learned judge, to find for the plaintiff or defendant, according as they found that the defendant had notice of any goods being in Jennings' possession liable to be taken in execution, or that he had an interest in those goods in question while they were in Lawless' possession; intimating, however, that a notice which was proved to have been given to the sheriff's clerk in the office, with whom the *fi. fa.* was left, was not notice to the sheriff, as such clerk was not a person to whose duty it belonged to execute any process of that kind; that any notice given by Mr. A. could not be treated as notice on which the sheriff was bound to act, on account of his former conduct and declarations being inconsistent with what he then stated, and the sheriff could not be bound to believe one statement more than another; and he told the jury also, that "the notice to the clerk was not given till "two days after the goods had been seized by the sheriff under the "commission of bankruptcy, and when the sheriff could not by law seize "the same goods under execution."

The jury found for the defendant.

*J. Duggan* moved for a new trial, on the law and evidence, and for misdirection. He referred to 1 Campb. 218, 389; and to the 25th sec. of the Bankrupt Act. He contended that the judge ought to have directed the jury, that the sheriff should have seized and sold the moiety of the debtor Jennings in the goods.

*J. H. Hagarty* shewed cause, and cited 2 C. & P. 357; 8 Jur. 335, 341; 5 Jur. 650.

The facts of the case, and the arguments of counsel, are fully given in the judgment of the Chief Justice.

ROBINSON, C. J.—The plaintiff, at the trial, endeavoured to shew the return false on two grounds: first, because Jennings, the debtor in the *fi. fa.*, had goods in a certain inn or canteen, which the sheriff had knowledge of, and knew to be his, and ought to have sold to satisfy his debt.

As to that ground, it seems to have been clearly made out that there was no cause of action; for that the sheriff, having other writs against Jennings in his hands, prior to the plaintiff's, did levy upon them and sell those goods, and that, having satisfied out of the proceeds the landlord's claim for rent, the remainder was applied upon the prior *fi. fa.*'s, which it was insufficient to discharge.

Then as to the other ground on which it was sought to charge the sheriff, the evidence respecting it was most extraordinary. There was no plea on the record impeaching the judgment, and therefore the jury was not called upon to determine whether it was *bonâ fide* or otherwise, but they could not shut their eyes to the complexion of the whole transaction; and it seems to me scarcely credible, that any number of intelligent men could have come to any other conclusion, than that the partnership spoken of, and Jennings's alleged interest in the goods which were in Lawless' shop, and this large judgment of O'Neill's against Jennings, which Lawless, his partner, (if there was really any partnership) swore he had not heard of before—were all of them matters about which it was impossible to feel any degree of confidence, and that the truth of any of them was so doubtful, that it would be the height of injustice to hold a public officer responsible as a wrong doer because he had not been able to penetrate the contrivances of these parties, framed as they were confessedly with a view to deception, and because he could not discern intuitively what, after the judicial inquiry that has been had, remains as doubtful as ever.

It would have been unjust and illegal, in my opinion, to find the sheriff guilty of a false return upon such evidence.

In the first place, as to the fact of Jennings having an interest in the goods which had been in Lawless' shop, it was by no means satisfactorily made out how that really was. It was sworn that they had been bought chiefly at Hamilton, of merchants there, by Lawless, and in his name, and had been charged to him, the credit having been given upon letters which he had taken to those merchants. There was some evidence that some goods had been bought partly or wholly on Jennings' security, but what portion these formed of the goods in the shop when the commission of bankruptcy issued, was not shewn. That all the goods, while they were in the shop, had been generally treated and dealt with as the goods of Lawless alone, and had been bought and sold in the course of a business ostensibly carried on by him alone, there seems to be no doubt, and whose they in fact were, either wholly or in part, cannot be said to have been proved upon the trial.

Then how can the sheriff be said to have failed culpably in his duty, in not seizing them on a *fi. fa.* which he held against Jennings alone? It is urged that he ought to have done so, because, after Lawless' bankruptcy, and after they had been seized as the goods of the bankrupt, Mr. O'Neill's attorney went to the sheriff's office, and told a clerk there that the goods in fact partly belonged to Jennings, and shewed him

what he advanced as a deed of copartnership, and insisted on the sheriff selling what he asserted to be Jennings' interest in the goods.

I am not prepared to hold, that because the sheriff has a clerk in his office to keep accounts, receive moneys, receive and enter process, and do acts of that kind, which while the office is kept open there must be some one employed to do, he is therefore to be held bound by every communication that may be made to that clerk respecting any business to be transacted by the sheriff. A writ given to such a clerk may well be considered as delivered at the office, as a rule served on an attorney's clerk is treated as served on the attorney; and the sheriff may be properly and reasonably held bound by the acts of his clerk, and by notices given to him, to a greater or less extent, according to the purposes for which the clerk is apparently employed there, and the authority which a sheriff is found ordinarily to intrust to him; but when it comes to assuming, that as a matter of course, and merely because he is serving in some capacity in the sheriff's office, the sheriff must therefore be held to be cognizant of every deed or other writing exhibited to that clerk, and carried away again by the party, and is bound to act, at his peril, in accordance with its contents, which he has never seen, we cannot but see that the sheriff is placed in a most dangerous position. He must then take his chance of the clerk's understanding and duly appreciating whatever is told him or shewn to him in relation to process in the sheriff's office, with the execution of which he has nothing to do. The least delay, or misapprehension, or want of memory or judgment on the part of the clerk, in a matter of this kind, over which it is not his business to have any superintendence or controul, might be ruinous to the sheriff.

I should require to be warranted by some authority for holding that all information given to a sheriff's clerk, relating to the objects of any process brought to the office, is notice to the sheriff, before I should feel justified in placing sheriffs in that position. It may be difficult to draw a line in such cases, but at present I do not consider the responsibility unlimited, and the fact in this particular case was sworn to be, that the sheriff did not receive the information which O'Neill's attorney gave to his clerk; but the next point in the case is, if, after the sheriff had taken the goods under the commission of bankruptcy, Mr. A. as O'Neill's attorney, had come to him and told him, that Jennings was in truth a part owner of those goods, and that he must seize them under the *fi. fa.* against Jennings, would that, under the strange circumstances of this case, and considering the conduct of the same attorney, have been such legal notice to the sheriff of the fact, as must make him answerable if he disregarded it?

The same person who appeared in the character of O'Neill's attorney, had not long before gone to the sheriff, for the express purpose of warning him, that the very same goods were not the property of Jennings, that he had no interest in them, that they were the property of Lawless alone, and that if the sheriff presumed to sell them as belonging to Jennings, on another *fi. fa.* which he then held, and upon some rumour to that effect which had reached him, he should prosecute him for doing so. What was the sheriff then to believe, if the same person came afterwards and told him precisely the contrary, and insisted on his doing on



behalf of one plaintiff, what he had threatened to prosecute him for, if he should venture to do on behalf of another plaintiff, better entitled if the truth were so, because his writ was prior?

A notice, to be of any value, must be given under such circumstances that it may be supposed to be given in good faith, and with the intention that it shall be believed.

Now both the accounts given by Mr. A. of Mr. Jennings' interest in these goods could not be true, and how could the sheriff tell which he would be safe in believing?

It is absurd to call such a communication a notice. As the sheriff had believed and acted upon the former notice of this same attorney, he could not be expected to believe him when he came with a different account; and if a person, acting as Mr. A. is sworn to have acted in this matter, can claim to have his representations implicitly confided in, and throw responsibility upon public officers, by giving information to suit his purposes with regard to the fact, he can lay what traps for the sheriffs he pleases, and can favour one client at the expense of others.

If the goods out of which Mr. A. desired O'Neill's executors to be satisfied, were in any degree the property of Jennings, when the notice relied upon was given, they were equally Jennings' goods when the same attorney forbade the sheriff from seizing them on Mr. Ermatinger's execution. And if they had been seized and sold, as they ought to have been according to Mr. A's present account of the matter, how do we know what would have remained to satisfy the *fi. fa.*, and how much damage can we say that this plaintiff has sustained, if the whole truth had been at all times frankly declared?

Then after all, if we admit that the sheriff should be regarded as knowing all that Mr. A. told his clerk, still the question is what was proved on the trial to be really the fact.

If there was any partnership, of what description was it? It might or might not be of that kind, as to give Jennings an interest in the goods in the shop; it does not appear how that was; all was mysteriously concealed; it was sworn that Mr. A. who drew the partnership deed, and Lawless and Jennings, both the partners, agreed to conceal the fact of partnership, that is not merely that they would be silent and not unnecessarily disclose it, but that they would deny it and deceive the public respecting it.

It may or may not have been accidental that Mr. A., who was a party to this arrangement, should have been selected by Mr. O'Neill also as his attorney, but it is a suspicious circumstance that he comes in just at the right moment with this large execution, attempting to cover by it a moiety of the goods which, according to all former appearances, and according too to his own earnest representations on a former occasion, ought to be applied through the Bankrupt Court to satisfy, so far as they would go, the debts of the persons who had credited Lawless as a merchant, and apparently a sole trader, with these very goods.

Is the sheriff to be left to take his chance of the exact truth of these transactions, amidst all these attempts to deceive him; and is he to be ruined perhaps, because he does not believe the right story, and at the right time?

Then what is the exact nature of the copartnership deed, which it is

sworn the attorney drew, witnessed, and promised to keep secret, and which he chose only to advance when it suited the purposes of the plaintiff whom he desired to favour?

I do not find that that deed was proved at the trial; we have no chance of seeing its contents, the jury had it not before them, and could not tell what it would establish. It might shew when produced, that Jennings had no legal property in the goods that were in the shop, and that the attorney's first statement was correct; and certainly if it had been shewn, and if it were proved to import on the face of it, that it made Lawless and Jennings partners in the ordinary sense of the word, and so joint owners of the goods, the jury were still at liberty to infer that after it was executed, the parties had made other arrangements between themselves, which led Mr. A. to represent, as he did to the sheriff, when he intimated an intention to seize on Ermatinger's execution, that Jennings had no right whatever to the goods. That may have been true for all we can tell, and if this plaintiff's attorney solemnly made statements which might be true on that supposition, and which could not otherwise be true, it would be more safe and more just to infer from his statements, that such was the case, as he was clearly in the confidence of both the partners, and was employed by them, than by adopting his last statements without satisfactory information, to throw a liability upon the sheriff which there may be really no just foundation for.

And at last, if the case were free from all these unpleasant circumstances of suspicion, and if the facts were, that Jennings had been all the time in the common sense of the word a dormant partner, if there had been no mis-statements, but the facts had been merely not disclosed, and were now made to appear clear and certain by testimony that could not be doubted, what would then be the injury to this plaintiff, from anything that the sheriff has done or omitted? I mean, if two days after the sheriff had seized these goods under the commission as those of the bankrupt, he had been satisfied that Jennings was in fact a partner with him, and so a tenant in common of these goods, what could he and ought he to have done for the benefit of this plaintiff, having a *fi. fa.* at his suit in his hands against Jennings' goods? Could he certainly have done anything under the writ, from which we can see that the plaintiff would have received an advantage? What the sheriff can do upon an execution against the goods of one of two partners, under the particular circumstances of one or the other of the two being a bankrupt, and the other not, is among the most doubtful questions which have perplexed the courts both of law and equity. The cases upon it are very numerous, and there is a want of precision, a fluctuation, a vagueness and uncertainty in the language of the courts, that is most embarrassing.

I refer, as an instance of this, to the case of *Barker v. Goodair*, 11 Ves. 78, one case out of many in which the question came before Lord Eldon, and which always to his apprehension seemed to be attended with numerous difficulties.

I refer also to *Ex parte Hamper*, 17 V'y. 404, and to the earlier cases in law and equity, of *Ex parte Hunter*, 1 Atk. 226; 1 Shower, 173; *Heydon v. Heydon*, 1 Salk. 392; *West v. Skipp*, 1 V'y. 259; *Fox v. Hanbury*, Cowper 445; *Taylor v. Field*, 4 V'y. Jr. 396; *Chapman v. Koopes*, 3 B. & P. 289; *Parker v. Pistor*, 3 B. & P. 288; *Dalton v. Harrison*, 17 V'y. 201.

The result of all the cases seems to be, that the sheriff could have sold nothing more than the possible right of Jennings to something that might remain to him as his separate property after all the partnership debts had been paid, and after the full adjustment of accounts between him and Lawless; and who can say what that would have left, or what evidence had the jury that it would leave anything?

In *Heydon v. Heydon*, 1 Salk. 392, it was held that judgment and execution against one partner for his separate debt, does not put the other in a worse situation, for he must have all the allowances made him before the judgment creditor can have the share of the other applied to him.

In *Fox v. Hanbury*, Lord Mansfield confirms this.

In *Taylor v. Fields*, 4 V'y. Jr. 396, the Chief Baron said, "the right of the separate creditor under the execution depends on the interest each partner has in the joint property; he had that which was undecided, and could only be decided by first delivering the effects from the partnership debts. If the partner himself had nothing more than an interest in the surplus beyond the debts of the partnership, upon a division, if it turns out that at common law that is the whole that can be delivered to or taken by the assignees of a partner, the executors, the sheriff, or the assignee under the commission of bankruptcy, all that is delivered to the creditor taking out the execution, is the interest of the partner in the condition and state he had it, and nothing was due to this partner separately; the partnership being insolvent, the whole property was due to the partnership creditors, and not to either partner."

In *Dalton v. Morrison*, 17 V'y. 201, the Lord Chancellor says, "an execution under a judgment at law transfers no part of the joint property, but merely gives a right to an account, each partner having an interest not in the whole, but in the surplus merely."

The field is a very extensive one, but it would be tedious to compare and analyse all the cases, and quite unnecessary for the purpose of the present case, when it is so evident upon the broad merits of the case, the verdict is proper.

I do not at present consider, that after the goods had been seized under the commission, and put properly into the course of administration for the satisfaction of the partnership debts, to which they were clearly first liable, the sheriff could do anything upon the execution against the dormant partner, which came subsequently to his hands; but I am at any rate on other grounds clear, that this rule for a new trial must be discharged.

MACAULAY, J.—In the absence of the alleged articles of partnership, which do not appear to have been produced or proved at the trial, it is not shewn that even between themselves (Jennings and Lawless) the former was a joint owner of the goods in question, or, in short, that he was a partner at all.

He may, however, have been so far a partner as to be interested in the profits of the business, without being a joint owner of the stock in trade. We do not know what date the suppressed articles of partnership bear. I say suppressed—for, according to the evidence of Lawless, it was understood that the joint interest thereby acquired by Jennings was to be concealed from the public, and not only so, but that the existence of any such interest was to be denied; and it was proved to have been denied by Mr. A., their attorney, with their approbation.



I cannot find that, admitting Jennings to be (as between themselves) a dormant partner, such secret, concealed and disavowed understanding, could be set up to establish a joint right of property in Jennings against the creditors of Lawless, a bankrupt, and apparently a bankrupt in relation to debts contracted in the purchase of the goods in question or of some of them, or of some other goods purchased for the purpose of carrying on the alleged partnership business. Lawless was allowed to hold himself out as sole owner and proprietor of the visible stock, and was so represented with the knowledge and assent or by the desire of Jennings. If the rights and claims of the creditors of Lawless could be thus infringed—and their interests are indirectly involved in the consideration of this case—certainly an unequivocal case should have been made out, which has not been done.

On the contrary, the only notice to the defendant, as proved, was made to his clerk by Mr. A., the plaintiff's attorney, *after* the delivery of the plaintiff's execution, not concurrently with it, such notice being given by Mr. A., who had previously prohibited the defendant from touching the goods, as being in part owned by Jennings. Mr. A. himself did not appear as a witness on this trial, and whether he could, if called upon, explain or reconcile the extraordinary conduct imputed to him, we do not know; but as it is, the existence of a partnership, so far as the defendant is concerned, consisted in Mr. A.'s assertion of it to the defendant's clerk, with the exhibition by him of a paper which he said constituted the articles, but for which the clerk or the defendant had nothing but his word, in opposition to a previous assertion from him that Jennings had no interest.

Then the interest of Jennings—tangible or saleable under the plaintiff's *fi. fa.*, even if he was a joint owner—is contingent and uncertain; and the evidence affords no satisfactory data by which the plaintiff's damages could be estimated. The whole of the goods were already in the custody of the law, under a commission of bankruptcy against Lawless, who was the ostensible and avowed sole owner, as represented on behalf of, and with Jennings' assent, before the plaintiff had any judgment or writ, or any right to set up or assert an interest in him. I do not think the defendant was bound to adopt and act upon such a notice as was given, under the circumstances, and that without questioning the competency of the clerk to receive ordinary notices or other communications in the course of the business of the office, the present was a notice given out of the ordinary course, and one which, so given, the defendant was not bound to recognize, adopt or rely upon. It came from a source on which he could not be expected to place any confidence. Bad faith, on the one hand or the other, was apparent; and had it gone to the jury on the mere question of right of property in Jennings, or of the fact of due and reasonable, and, I may say, credible notice, they could not be expected to have found a verdict for the plaintiff with damages against the defendant.

I approve of the present verdict on the merits, and concur in what has been said by the Chief Justice.

McLEAN, J., concurred.

JONES, J., sitting in the Practice Court, gave no judgment.

*Per Cur.*—Rule discharged.

### HURON DISTRICT COUNCIL v. THE LONDON DISTRICT COUNCIL.

One district council may sue another district council for a cause of action connected with their public duties ; and the balance of district revenue which one district withholds from another affords legal ground for such an action.

A district council cannot be sued upon the common money count upon the account stated, unless at least the subject matter of account be averred, and is seen to be such as can by law create a debt from the defendants to the plaintiffs, to be satisfied out of the funds of the district.

To recite certain statutes as statutes of the province of "*Canada*," when they are in fact statutes of the former province of "*Upper Canada*," is bad on general demurrer.

It is also bad on general demurrer, to refer to any statute as having been passed in *two of the years* (as the 4th and 5th) of her Majesty's reign.

*Semble* : That it was not necessary, before action, to give a notice to the *treasurer* of the London district of the claim of the plaintiff against the district.

*Semble also* : That it was necessary, in order to a right to action, to aver a request from the plaintiff to the defendant to pay over the money due.

*Semble also* : That in suing for a debt as due by the district, under the 43rd clause of the 4th and 5th Victoria, chap. 10, it should be averred that the defendants have funds to pay the debt, after discharging the demands to which the 59th clause gives a preference.

The plaintiff declared against the defendant on three counts. The 1st count recited the Act of 1 Vic. ch. 26, sec. 5, 13, and the 2nd Vic. ch. 30 ; and then averred, that to wit, on the 11th of July, A. D. 1839, the justices of London in the Quarter Sessions, determined that the proportion of ordinary expenses to be borne by the county of Huron, should be equal to one-seventh of the ordinary expenses of the District of London ; and that it became the duty of the treasurer of London to deduct the same from the rates and assessments of Huron, and to pay over the residue of such rates to the *said treasurer of the county of Huron*, yet the said treasurer not regarding his duty, did not pay over annually to the *treasurer of the county of Huron*, the balance of rates and assessments as aforesaid, but wholly failed and made default, whereby a large sum of money in each year remained unpaid to the said *treasurer of Huron county*, and was retained by the treasurer of the London District, contrary to his duty, for and by order of the justices of the London District and at their disposal.

The plaintiff averred, that on the 14th Oct., 1841, when said county of Huron was declared a separate district, 376*l.* 14*s.* 6*d.* being the aggregate amount of the moneys so retained, was due and payable to the *treasurer of the county of Huron* by the London treasurer, but was wrongfully withheld as aforesaid. The plaintiff recited another act, 4 & 5 Vic. ch. 10, sec. 43, (speaking of the act "*as passed in the 4th & 5th years of the reign of Queen Victoria*") that district councils should assume all debts, &c. on the 1st *January*, 1842, and averred that the said sum of 376*l.* 14*s.* 6*d.* remained due on 1st *January*, 1842.

The 2nd count recited 1 Vic. ch. 26, sec. 5, 13, and 2 Vic. ch. 30, and averred one-seventh delivered as aforesaid, &c., but that in 1844, there was a deduction made of five twenty-eighths, being one twenty-eighth too much, and that on the 14th Oct., 1841, 158*l.* 0*s.* 6*d.* remained due, but was withheld, contrary to defendants' duty, &c.

3rd count, the common count on an account stated.

Demurrer to 1st and 2nd counts, because no action for such demands would lie.

To 3rd count, 1st, because no such action was sustainable; 2nd, subject of account stated not shewn; 3rd, that it was under *sealed* authority.

In addition to the special grounds of demurrer assigned to the 1st and 2nd counts, the defendants filed with the court the following:

1st. That there was no act of the parliament of *this province* authorising the erection of the county of Huron into a separate district.

2ndly. That there was no act of the parliament of *this province*, passed in the second year of the reign of the now Queen, as stated in the said counts.

3rdly. That it was not alleged in either of the said counts that any Treasurer for the county of Huron was ever appointed.

4thly. That the surplus rates, if any, were to be paid to the Treasurer, for the account of the district or county of Huron; and not of the magistrates, as stated in the said counts.

5thly. That it was not averred that the Treasurer of the London district had notice of the supposed decision of the magistrates.

6thly. That it was not shewn that any rates or assessments were collected in the county of Huron, or paid to the Treasurer of the London district, nor that there was any annual surplus.

7thly. That it was not averred that any demand was ever made by any authority, or by any person, upon the Treasurer of the London district, for the money claimed to be due.

8th. That it did not appear what surplus rates, if any, became due in each year (the statute providing for yearly payments by the Treasurer of the London district), but only that a gross sum in all became due, and not for any year in particular.

9th. That the breaches should have been several, and for the non-payment of the surplus rates of each year.

10th. That there cannot be a statute passed in the fourth and fifth years of the reign of her Majesty; and it did not appear by what parliament the said supposed act was passed.

*H. J. Boulton, Q. C.*, for the demurrer. He referred to the several grounds of demurrer mentioned above, and cited 2 Mod. 44; 2 T. R. 479; 3 Tyr. 26; 1 Saund. 269 (a) note 2; 1 A. & E. 327; 2 E. R. 342; 2 B. & C. 684; Beikie v. Ruggles, U. C. R.; 6 T. R. 776; 1 Ch. Pl. 215.

*P. M. Vankoughnet*, contra. He referred to Low v. Ottawa District Council, 4 U. C. R. 194; 8 L. Times, 859; 5 Bing. N. C. 253; 4 B. & C. 962; 6 A. & E. 829; Ibid. 846; Metcalfe v. McKenzie, 2 U. C. R.

The arguments of counsel immediately referring to the District Council Acts, as well as to the several points raised on demurrer, are fully stated in the judgment of the court.

ROBINSON, C. J.—The first point that was made in the argument is, as to the right of the District Council to sue, and their liability to be sued, *in any case*.

By 4 and 5 Vic. ch. 10, the inhabitants of each district are incorporated, and are made capable of suing and of being sued, and “of making and entering into such contracts and agreements as may be



"necessary for the exercise of their corporate functions." These powers, it is enacted, shall be exercised by and through and in the name of the council of every such district respectively. (Sec. 1.)

They can only, we see, make such contracts as may be necessary for the exercise of their corporate functions, and it follows, as they can bind themselves by no express contract except such as may be necessary for the exercise of their corporate functions, neither can there be any implied contract raised against them, except of the same description. In other words, they can only be assumed to have agreed to do what the law makes it their duty to do.

The 43rd clause enacts, "that all lawful debts and liabilities of any district, or of the justices or treasurer for the same in respect of such district, *shall be assumed and paid* by the District Council thereof, upon, from and after the first day of January, 1842, on the same terms and conditions as they would have been payable by, and might have been enforced against, such district treasurer or justices, and all debts, obligations and *liabilities of any kind* whatever, due to, or contracted in favour of such district, or to or in favour of such treasurer or justices in respect thereof, and all property whatsoever belonging to the district, shall at the said time (1st January, 1842,) become vested in, and due to, and may be enforced by the district council, on the same terms and conditions as they would have been due to, and might have been enforced by such district, or the justices of the peace, or the treasurer for the same, if this act had not been passed."

By the act for the erection of the Huron District, 1 Vic. ch. 26, it was enacted, that the justices of the peace residing within the County of Huron (which then formed part of the District of London, but which it was proposed to erect into the new district,) should obtain plans and estimates for a gaol and court house, and a committee was to be appointed for entering into contracts, which committee was to be under the controul of the justices within that county.

The effect of those clauses in the act clearly is, that the committee was to have power to contract in the name of the district, or *of the inhabitants of the district*, with some person who would undertake to build the gaol, and that so soon as the new district was proclaimed, then this committee would cease to exist, the justices of the district would come in their place, the treasurer of the new district would come in the place of the treasurer of the building committee, and the obligation to pay for the gaol and court house would be an obligation incumbent on the district, as represented, before the 4th and 5th Vic. ch. 10, by the justices in sessions, having been imposed upon them through the agency of this temporary committee, whose existence was clearly to cease when the County of Huron should become a district.

Then it seems to follow, that the contractor for the building would, under the 43rd clause of the District Council Act, have a right to treat any debt under the contract with the building committee as a debt due to him by the district council. They have no discretion as to assuming or paying it, but are bound by the statute to do both; the law imposes the debt upon them as representing the district, and as being an incorporated body, against whom a legal remedy can be conveniently had by an ordinary action. It would be a debt, I think, for

which the Huron District Council might be sued under the first clause of the act. Then if this be so, it must follow as a consequence, that the District Council of Huron has a legal right to whatever funds are by law appropriated to the payment of the charge for building the gaol and court-house, and not the person who was treasurer of the building committee, for he has no longer anything to do with the matter; if he should be still in existence, his authority and duties are at an end.

I thought during the argument, that there might be found some legal objection to this remedy by action by one district council against another, in respect to a cause of action connected with their public duty, and that the remedy should rather be by *mandamus*; but all their duties are public duties, and all their acts have reference to public interests and measures, and if resort must on that account be had to *mandamus* in one such case of a clear debt, then I cannot see why they should not be confined to that remedy in all cases.

But if we were to hold that, then the power to sue them would have been given by the statute in vain. They are not like the supreme government of the country; they constitute a municipal corporation for local purposes defined by law; they are not under the control and direction of the executive government, as a receiver-general appointed by the crown is; they have precise legal duties cast upon them by law, and when the law directs that they shall pay their debts, and that they shall be liable to be sued, I do not know upon what cause of action they could more clearly be liable to be sued, than for non-payment of a debt. Undoubtedly the question arises, and it may be a difficult one to answer in some respects, out of what assets is an execution against them to be satisfied? But no consideration of that kind can justify us in denying that a district council can be sued, because the statute is express that it may be sued, and the same difficulty would apply in any other action as in this.

We are not to assume that the council will not voluntarily apply the district funds in discharging any demand which they are legally adjudged to pay, without the seizure and sale of any corporate property, and if not, yet we cannot assume that there is no such property which could be legally seized and sold.

If after all, the judgment should turn out to be fruitless, that would be an inconvenience for which we are not responsible.

Upon the best consideration which I can give to the matter, I can see no good reason why these district councils, which are all liable to sue and be sued by individuals, may not sue and be sued by each other, just as any incorporated cities might, or indeed any incorporated companies to which the capacity to sue and be sued is given by law.

It is also my opinion that any balance of district revenue, which may have been withheld from the district of Huron, by the district of London, which it was clearly the duty of the latter to pay over to the former, affords a legal ground for such an action.

It has been argued that the 43rd clause, in the terms of it, only gives an action where the justices of the peace might have sued or been sued, if the District Council Act had not been passed.

The same argument was used in *Low v. The Ottawa District Council* in this court, but we held then as we must hold now, that that is clearly

not the effect or intention of the clause, or there would be no value in the power conferred by the act, since the justices could clearly not have sued or been sued, as representing the district in any case of the kind. It is to the terms and conditions of previous debts and contracts, that the restrictive language of the clause applies, and these are not to be changed, though the form of remedy is.

I think therefore, that so far merely as the general principle is concerned, without regard to particular exceptions, the action may be sustained.

Then as to the exceptions, I think it is a good exception to the first and second counts, upon general demurrer, that there are no such statutes of the province, that is of "Canada," as are recited in those counts, those set out being both statutes of the former province of Upper Canada, and it is also a good exception that there is not, and cannot have been any statute passed in the *fourth* and *fifth* year of Her Majesty's reign; the statute was in fact passed in the fifth year of Her Majesty's reign, in a session which was held partly in one year and partly in the other, and this exception I am also of opinion must prevail on general demurrer. It has been so decided in England, for though the statute need not be so particularly recited, yet we cannot reject the description which the plaintiff has chosen to give of it as surplusage. He professes to ground his action upon such a statute as he describes, and we must notice judicially that he misrecites it.

The statement, that on the 14th of October, 1841, when the new district was proclaimed, a large balance became payable to the treasurer of the county of Huron, is not correct. The District Council Act had then been passed, there was no such person as treasurer of the county of Huron, the money was payable in January, 1842, to the district council, and before that should have been paid to the treasurer of the new district.

As to the objection that notice to the treasurer of the district of London, of the order made by the justices under the act 2 Vic. ch. 30, should have been averred, there does not seem to me to be anything in that. It is not the object of this action to convict the treasurer of a default or to fix him personally with a liability. The plaintiffs are suing for a sum of money alleged to be still remaining in the treasury of the district of London, but which ought, they say, to be paid over to them. It is now of no consequence whether the treasurer ought to have paid it before or not. The question is, whether it is due to the plaintiffs. The justices must be supposed to have been cognizant of their own order. The treasurer was but their subordinate officer, whose accounts they were bound to inspect, and to see that he made all such payments as ought by law to be made out of the district funds; and if the treasurer did not in fact pay over the money now sued for, either from his own inattention or theirs, that would not affect the right of the district of Huron to claim it as a debt still due to them by the district of London.

But I am not quite clear that the objection is not well founded that a request by the plaintiffs to the defendant to pay over the money was necessary to give a right of action, and should therefore have been averred. The language of the judges in the case of *Simpson v. Routh et al.*, 2 B. & C., 682, tends strongly to support it.



It is not, however, material to go through all the causes of demurrer insisted upon in the argument.

Upon several of the grounds mentioned, I think the first and second counts are bad on general demurrer, though the plaintiffs could, in my opinion, by amending them, sustain their action.

As to the third count being the ordinary count upon an account stated, I am not of opinion that it can be supported. The district council is not a corporation for trading purposes. They represent the inhabitants of the district for the better carrying into effect certain public objects, among others to raise and expend the public money in the manner regulated by law. The monies subject to their control are raised by taxation upon the people under the authority of public statutes. The district councils have no power to do with them as they like; they act in a merely representative capacity, and their acts are legal so far only as they are within the sphere of their authority. They cannot give a right to the district funds to any person or persons, by simply acknowledging that they are debtors to that amount, without its being shewn on what account they became debtors, for they have no discretionary power to bind the inhabitants and funds of the district. If they could be sued on a common count on an account stated, they could be sued on a common count for money lent, or for work and labour.

It should have been averred that an account was stated of certain monies due by the defendants to the plaintiffs for and by reason of some matter which can by law create a debt from the one to the other, to be satisfied out of the funds of the district.

Besides, as I have already noticed, the first clause of 4 & 5 Victoria, chap. 10, only authorises these Councils "to enter into such contracts "and agreements as may be necessary for the exercise of their corporate "functions." And if they cannot expressly bind themselves except by contracts for such purposes, neither can they do so impliedly.

In this respect they differ from individuals, who can contract to do any thing not illegal or immoral, and can make their own estates liable to satisfy any such contracts.

In the argument, the defendants' counsel referred to the decisions of this court in the case of *Ireland v. Guess et al.*, and *Ireland v. Noble*, which are only so far in point, that the court held there, as I think we must here, that the action would not lie without the ground of the cause of action being specially shewn; but the cases were different in their circumstances. There the plaintiff, being clerk of a turnpike trust, was suing in his own name upon securities given to other people; with which securities, for all that appeared upon the face of them, he had no more to do than any stranger might have. If they were securities which had been given to the payees on account of a debt accruing to them in the execution of the law regulating the turnpike trusts, then the statute gave to the plaintiff, as clerk to the trust, authority to sue upon them; but unless that was the case, he had no authority.

It seemed to me in those cases, that upon the plainest principles, the declaration ought to shew that the ground of action was really such that under the statute the plaintiff had authority to sue for it, though he had no apparent privity with the subject matter of contract. So I think also in this case, though not for all the reasons that applied in the cases which I have just referred to.

The declaration, as it regards any claim upon an account stated, is defective in not shewing that the parties accounted together concerning some matter which by law could create a debt between them, for they are not like corporations or individuals acting in their own concerns, at liberty to bind themselves to any extent and for any purpose, and having property of their own, which is by law liable to answer whatever contracts they may choose to make.

They are only authorised to execute the provisions of certain positive laws; and whether they appear as plaintiffs or defendants, they must shew themselves to be acting within those provisions, and with a view to them.

It is to be considered that the 59th clause of the statute 4 & 5 Vic. ch. 10, in classing the different claims upon the district revenues, makes all debts to be assumed by the district council, under the 43rd clause, the third head of charge, and expressly disables the district council from paying such debts out of the district funds till certain other charges have been first provided for.

This seems to impose upon the plaintiffs in an action against the district council for a debt of the description sued for, the necessity of averring and shewing that there are funds in their hands out of which the debt could be paid, after discharging the demands which by law are entitled to preference, because it is only then that the duty to make the payment commences, which is the foundation for the action.

It may be urged, and with reason, that as neither the justices nor the district council of London could, without violating the law, have expended more than their proportion of the duties levied in the county of Huron, which the justices had appointed, therefore it must be assumed that the remainder of all such duties is still in the district treasury, and that being there it forms no part of the funds of that district which can be diverted to any of the charges upon that district which are entitled to preference as regards their own funds. Still, it seems to me, we cannot hold otherwise than that such monies not paid over do constitute a debt, which under the 43rd clause the district council must be held to have assumed.

The object of this action is to compel them to do so, whether they have still the proper monies in hand or not, and pursuing their remedy on this broad footing for a debt, as I think the plaintiffs have a right to do, with a view to obtaining satisfaction at all events out of the funds of the district, present or future, it appears to me that thus suing for it and treating it as a debt under the 43rd clause, they should aver that the defendants have funds to pay it after discharging the demands to which the 59th clause gives a preference.

If the plaintiffs find it necessary to persevere in their action, they should be allowed to amend their declaration, so as to free it from these and any other exceptions, but surely there can be no necessity for expending the district funds in an unseemly contest between the two districts, when it must be presumed that the only question between them must turn upon some legal doubt, which could be settled either by submitting to the best legal opinion, or by stating a case amicably for the opinion of this court, as the law enables them to do.

MACAULAY, J.—I have not been able to satisfy myself that the monies

sought to be recovered in this action, do not constitute a debt due by the London to the Huron District, if there be in point of fact funds available to satisfy the same; or that an action of debt will not lie for such moneys, grounded on the duty imposed by the statute upon the one district and its officers, to pay to the other district.

But I think the special counts in the present declaration defective: in the first place, it is not clear in what form of action they are conceived, whether in debt, assumpsit or case; they bear as much resemblance to the last as to either of the former.

The misdescription of the statute seems a valid objection, and I think a notice or demand should be averred. The debt sued for existed (if at all) before and upon the proclaiming the county of Huron into a separate district—and upon the first creation of the London District Council. The obligation to pay is not upon any contract entered into by the council, or that existed previously, but it arises out of a duty imposed by law, and although not a debt incurred by contract, it was a debt in law, one however which the defendants were not bound to satisfy until other charges upon the district funds had been previously satisfied.

I apprehend therefore, that not only a notice or demand should be made before action, but that it ought to be averred that the defendants possessed surplus funds applicable to the satisfaction of debts existing, 1st January, 1842, as provided for under the 3rd head of 4 & 5 Vic. ch. 10, sec. 59, after defraying the charges under the 1st and 2nd heads.

As to the account stated, it would no doubt be better that it should appear to have been in relation to corporation transactions, but I am not prepared to say these two district councils cannot in law account together in relation to such matters.

JONES, J., sitting in the Practice Court during the argument, gave no judgment.

McLEAN, J., concurred in giving judgment for the defendant on demurrer.

*Per Cur.*—Judgment for defendant on demurrer to declaration.

THE CITY OF TORONTO AND LAKE HURON RAIL ROAD COMPANY  
V. THE HON. GEORGE CROOKSHANK.

The City of Toronto and Lake Huron Railroad Company have, under the operation of the Act 8 Vic. ch. 83, amending the original act 6 Will. IV. ch. 5, a right to sue in debt one of the original stockholders for an instalment due upon the stock *originally* subscribed and called in by the directors appointed under the original Act of incorporation.

*Semble*: That where an Act of the legislature has become forfeited by a non-fulfilment of some of its conditions, the legislature may waive the forfeiture, and by special enactment continue the existence of the Act.

*Semble also*: That when an Act amending an original Act *recites* that it has been granted upon the prayer of the parties interested in the original act, it must be taken upon the recital as conclusive that each individual interested in the *original* Act was concurring in the passing of the amended Act.

Debt. “For that whereas before and at the time of the making of the call of money hereinafter mentioned, to wit, on the 1st day of August, A. D. 1836, and after the passing of an act of the legislature of that part of this province formerly Upper Canada, passed in the sixth year of the



reign of his late Majesty King William the Fourth, entitled, "An act to incorporate the City of Toronto and Lake Huron Railroad Company," and before the passing of a certain act of the legislature of this province, passed in the eighth year of the reign of her Majesty Queen Victoria, entitled, "An act to amend an act passed in the sixth year of the reign of his late Majesty King William the Fourth, entitled, 'An act to incorporate the City of Toronto and Lake Huron Railroad Company,'" the said defendant had subscribed to advance a large sum of money, to wit, the sum of 1000*l.* of lawful money of Canada, for and towards the purposes in the said first-mentioned act mentioned and set forth, and by virtue of such subscription the said defendant became and was one of the stockholders of the said company, and from thence until the passing of the said act, passed in the eighth year of the reign of her Majesty Queen Victoria, was the owner of and entitled to eighty shares, and from and after the passing of the said last-mentioned act, was the owner of and entitled to two hundred shares in the joint stock or capital of the said company, and whereas the said defendant being such subscriber and owner, and as such subscriber and owner having been, and being entitled to the said eighty shares, at the time hereinafter next mentioned, afterwards and after the passing of the said first-mentioned act, to wit, on the 13th day of April, A. D. 1837, the first meeting of the stockholders of the said company was held at Toronto, pursuant to the said first-mentioned act, and whereas before such meeting, shares to the amount of 50,000*l.* of the said company, had been and was taken up, and thirty days previous notice of such meeting had been and was given in a certain newspaper, to wit, the Toronto Patriot newspaper, published in the Home District, pursuant to the terms of the said first-mentioned act; and whereas at such meeting, the said stockholders of the said company did proceed to elect, and did elect and appoint eleven persons, to wit, the Hon. William Allan, James Newbigging, John Simcoe Macaulay, William Botsford Jarvis, George Crookshank, John Ewart, William Ketchum, James McGill Strachan, George P. Ridout, George Ridout, and the Hon. John Elmsley, being stockholders of the said company, to be directors of the said company, from thenceforth until the first Monday of July then next ensuing; and the said directors so elected and appointed did afterwards, to wit, on the said 14th day of April, A. D. 1837, elect one of their number, to wit, the Hon. William Allan, to be president, and another of their number, to wit, John Simcoe Macaulay, to be vice-president of the said company, for the period aforesaid, and whereas the said defendant being such subscriber and owner as aforesaid, and as such subscriber and owner being entitled to such shares as first aforesaid, to wit, on the 14th day of April, in the year last aforesaid, the said directors so chosen and appointed as aforesaid, did make a call upon the stockholders of the said company for an instalment of ten per cent. upon each share which they the said stockholders had respectively subscribed, for the purposes in the said first mentioned act mentioned, and afterwards, to wit, on the same 14th day of April, the said directors caused to be published a notice of such call in a certain newspaper published in the Home District, to wit, the Toronto Patriot, pursuant to the provisions of the said first mentioned act; that such instalment was required to be paid by the said stockholders on a certain

day, to wit, on the 14th day of May then next ensuing, being thirty days from the publication of such notice, which period had elapsed before the commencement of this suit; and the said company aver that the proportion of the said defendant so called for in respect of the said eighty shares of the said defendant, in the capital stock of the said company, amount to a large sum of money, to wit, the sum of 100*l.* of lawful money aforesaid, and although the said defendant did afterwards, and before the commencement of this suit, pay and satisfy to the said company part of the said sum of 100*l.*, to wit, the amount of 35*l.* parcel thereof; yet he did not nor would pay the residue thereof or any part thereof to the said company, which said residue amounts to a large sum of money, to wit, the sum of 65*l.* above demanded, whereby an action hath accrued to the said company to demand and have of and from the said defendant the said sum of 65*l.* above demanded. Yet the defendant, although often requested, hath not paid the same or any part thereof to the said company, to the damage of the said company of 50*l.*, and therefore they bring their suit," &c.

4th plea. "And for a further plea in this behalf, the said defendant says, that neither the said double or single railroad or way, nor any railroad or way, authorized to be constructed by the said act in the said declaration firstly mentioned, was commenced within three years from the passing of such act, and this the defendant is ready to verify," &c.

10th plea. "And for a further plea, the defendant says that the said directors, so elected as in the said declaration mentioned, never made any by-law or ordinance regulating the time of holding any subsequent election of directors of the said company; and no election of directors of the said company was subsequently thereto, at any time prior to the passing of the said act in the said declaration secondly mentioned, held in pursuance of the provisions of the said act in the said declaration firstly mentioned; and the said double or single railroad or way by the act in the said declaration firstly mentioned authorised to be constructed, never was commenced within the period of three years from the passing of the said act in the said declaration firstly mentioned; and so the said defendant says, that from the passing of the said act in the said declaration secondly mentioned, he was not and is not the owner of eighty shares, or of any number of shares, in the capital stock of the said company, constituted and incorporated by the said act in the said declaration firstly mentioned, and revised and altered by the said act in the said declaration secondly mentioned, and of this the defendant puts himself upon the country."

11th plea. "And for a further plea in this behalf, the defendant says that the said directors, so elected as in the said declaration mentioned, never made any by-law or ordinance regulating the time of holding any subsequent election of directors of such company; and no election of directors of the said company was ever afterwards, at any time prior to the passing of the said act in the said declaration secondly mentioned, held in pursuance of the provisions of the said act in the said declaration firstly mentioned; and the said double or single railroad or way, by the said act in the said declaration firstly mentioned authorized to be constructed, never was commenced within the period of three years from the passing of the said act in the said declaration

firstly mentioned; and the petition in the said act in the said declaration secondly mentioned recited, was not prepared, signed or approved, by a majority of the persons who had subscribed to or had become holders of shares in the capital stock of the said joint stock company, under the provisions of the said act in the said declaration firstly mentioned, nor was any meeting of such persons held or convened, for the purpose of adopting or approving or signing the said petition, for the revisal or amendment of the said act in the said declaration firstly mentioned; nor was the defendant a party or privy to or assenting to the presenting the said or any other petition for such purpose, or to the passing of the said act in the said declaration secondly mentioned, nor even then; nor was there any persons or person authorised by the defendant, or by a majority of the persons who had been holders of shares in the capital stock of the said company, incorporated by the said act in the said declaration firstly mentioned, to prepare or sign the said petition in the said act in the said declaration secondly mentioned recited, in behalf of the holders of such shares; nor has the defendant ever consented to the capital stock subscribed, taken under the act in the said declaration firstly mentioned, or any part thereof, being embodied with or forming part of the capital stock of or being applied to the purposes of the said act in the said declaration secondly mentioned, and this the defendant is ready to verify."

"And the said company, as to the plea of the defendant by him fourthly above pleaded, say that the same is not sufficient in law."

"And the said company, as to the plea of the defendant by him tenthly above pleaded, say that the same is not sufficient in law; and the said company state and shew to the court here the following causes of demurrer, that is to say, that the same is double and multifarious, and attempts to put in issue several separate and distinct matters or grounds of defence, that is to say, the making of any by-law by the board of directors to regulate the time of holding future elections; that any subsequent election of directors was held previous to the passing of the second act; the commencement of the railroad within three years from the passing of the act of incorporation; and that the said tenth plea is in other respects double, multifarious, informal and insufficient."

"And the said company, as to the said plea of the defendant by him eleventhly above pleaded, say that the same is not sufficient in law; and the said company state and shew to the court here the following causes of demurrer thereto, that is to say, that the same is double and multifarious, and attempts to put in issue several separate and distinct matters or grounds of defence, that is to say, the making of any by-law by the board or directors to regulate the time of holding future elections; that any subsequent election of directors was held previous to the passing of the said act; the commencement of the railroad within three years from the passing of the act of incorporation; the adoption by the majority of the stockholders of the petition mentioned in the act secondly in the declaration mentioned; the convening of a meeting for the purpose of adopting the said petition; the fact of the defendant being a party to presenting the same; that there never was any one authorised by the defendant, or by a majority of the shareholders of the company, to prepare or sign the said petition; that the defendant



consented that the capital stock subscribed under and for the purposes of the first act should be applied for the purposes of the second act; and that the said plea is in other respects double, informal and insufficient."

The said defendant says that the said pleas are sufficient in law.

The defendant gave notice to the court that he would take the following objections to the declaration:—

"That the declaration disclosed no liability against him; that no action lies against him for the non-payment of any calls or stock subscribed for by him under the first mentioned act; that defendant was not bound by the second act; that by the second act the objects and bearing of the first act were materially altered, and the defendant, without express words, could not be bound to pay to the plaintiffs as now organized and acting under the second act; that the charter of said company was never acted upon or proceeded with as required by the said first act; that the alteration in amount of shares directed by the second act is only prospective as to future stockholders, and the action given under said second act can only apply to such future stock; that the company in which it was alleged that defendant was a stockholder had no legal existence at the commencement of this suit, and had no right to sue under either or both the said acts; that at the passing of said second act the said corporation or company had no legal existence, nor are they revived or continued by said second act; that no cause of action for any instalment or part of a share or shares, in any event existed under said second act; that the declaration did not aver that there was any election of directors after the first mentioned election, or under the second act, or that there were any directors at the commencement of the suit; that the call for an instalment, being for the purposes of the first act, was not revived or continued by the second act; that no general assent of the stockholders, or of the defendant, was averred or shewn to the alterations made by the second act, or for the adoption thereof, and the option mentioned in said second act was not averred to have been exercised by the stockholders."

The Hon. *S. B. Harrison*, Q. C., for the demurrer cited 2 Railway Cases, 867; 3 G. & D. 448; 4 A. & E. N. S. 430; 3 Burr. 1866; 4 T. R. 409; 4 M & S. 542; 5 Scott's N. R. 147, note; 6 Will. IV ch. 5; 8 Vic. ch. 83.

*Hagarty, Gwynne, Galt and Vankoughnet, contra*, referred to the following authorities, 8 C. & P. 422, 1 N. & M. 690; 1 E. R. 675; 2 M. & G. 164; 1 B. & Ad. 558; 1 Bing. N. C. 86; 4 Bing. 452; 7 Scott N. R. 87; Dwarria, Stat. 680; Russ. & Ry. 429; 5 Bing. 492; 6 B. & C. 341; 1 Q. B. R. 271; 4 Burr. 2060; 11 Jur. 74; 10 Jur. 460, 364; 9 Law Times, 83.

The argument of counsel is fully given in the judgment of the court.

ROBINSON, C. J.—This action gives rise to a question of some consequence to a number of parties. The courts in England have occasionally suspended their judgment in cases of this nature, when they saw reason to apprehend that the judgment which they would be bound to pronounce, might occasion extensive hardship or inconvenience, which the legislature would most probably interpose to prevent, if an opportunity were afforded to them for that purpose. In this case we have been pressed rather to

intimate our opinion with as little delay as may be convenient, in order that if it should seem to afford occasion for it, an application may be made to the legislature now in session, in time to enable them to make such provisions as may prevent one of their own statutes from having an injurious effect, contrary as it is surmised to their intention.

This is an action of debt brought by an incorporated railroad company, to compel a subscriber to pay an instalment of his subscribed stock, called in by the directors.

The defendant pleads among other pleas three that are demurred to, and on the argument of the demurrer, the defendant has taken exceptions to the declaration as bad in substance on various grounds. His objections are of that nature that they call in question, if not the existence of the company, at least the existence of any subscription list, and the authority of the company to take such steps as they have been taking, for carrying into effect the objects of their charter.

The questions turn upon the effect of the two statutes, 6 Will. IV., ch. 5, and 8 Vic., ch. 83, and in giving our opinion upon them, it must of course be understood that we cannot look further than the record and the statutes, and allow ourselves to be influenced by any facts which do not appear there.

Many things may have been known to the petitioners and the legislature, which may make the statutes in question reasonable or otherwise, or which might assist in forming a correct opinion of their probable intention, or enable us to judge more correctly than we can do now of the effect of these provisions, and of any judgment which we may form upon them; but except so far as these things appear in the record or in the statutes, we cannot notice them, for upon demurrer we can look at nothing extrinsic.

The legislature by their first Act, passed on 20th day of April, 1836, incorporated a company for the purpose of constructing a double or single iron railway from Toronto to the navigable waters of Lake Huron within the Home District, and they provided in the act that "the said road should be commenced within three years, and be completed within ten years from the passing of this act, otherwise the (said) act and every matter and thing therein contained, should be utterly null and void."

They authorised them to hold 500,000*l.* stock in shares of 12*l.* 10*s.* each, and to commence operations so soon as 50,000*l.* should be subscribed.

They provided for the election of directors, the calling in of shares by instalments of ten per cent., the forfeiture of shares and of money paid in, in case of failure to meet any of the calls of instalments, as is usual in charters of this description. The statute contained no enactment expressly authorising any compulsory proceeding, by action or otherwise, for collecting the stock called in.

The declaration before us states, that the defendant, under that legislative charter, became a stockholder, by subscribing eighty shares, or 1000*l.*; that on 13th April, 1837, the first meeting of stockholders was holden pursuant to the act, 50,000*l.* stock having been previously subscribed; that directors were then chosen as the act directs, to *serve till the first Monday in July following*; that the directors, on the 14th day of April, chose a president and vice-president, and made a call upon

the company to pay one instalment of ten per cent. in thirty days after the publication of their notice of such call; that the defendant was bound upon such call to pay 100*l.* in respect of his 1000*l.* stock, that he did pay 35*l.* part of it, but has never paid and refuses to pay the residue, 65*l.* whereby an action hath accrued to the company to demand the remaining 65*l.* So that the directors chosen in April, 1837, to serve in July, 1837, did within that period make the call in question, and for a part of it which was neverpaid, the company in their corporate name now bring this action.

By the first act, 6 William IV. chap. 5, the corporation had power given to them in the usual form of words, to sue and be sued, implead and be impleaded, in all actions, &c.; but, as I have already stated, without any authority expressly given to sue for calls.

Without conceding that they might not have sued in debt under their original charter, they have in argument maintained their right to this action against the defendant under the subsequent statute 8 Victoria, chap. 83, averring that the defendant still continues to be the owner of the amount of stock subscribed and held by him in 1837.

It is upon the effect of this latter statute and of the intervening circumstances and state of things, so far as they are set out in the record, or appear in the statutes, that the questions turn.

The statute 8 Victoria, chap. 83, recites "that the Toronto and Lake Huron Railroad Company had by their petition prayed that the former act might be so amended as to empower the company, in their discretion, to construct in lieu of or in addition to any railroad which they are now authorised to construct, a planked, macadamised, or blocked road, and so as to render it unnecessary that the road so to be constructed shall be confined within the limits of the Home District, and so as to extend to them further time for the completion of the same."

The statute then recites that it is desirable that the prayer of their (that is, the company's) petition should be granted. And the legislature does accordingly, by that act, give to the company (speaking of them as an existing company, and using their precise corporate name) power to construct, "in their discretion, in lieu of or in addition to any railroad they are now authorised by law to construct, a planked, macadamised, or blocked road, upon the same terms and under the same conditions and restrictions as they are authorised to construct a railroad; and to fix the terminus of any such rail, plank, macadamized, or blocked road, at any point on Lake Huron they may deem most advisable; and that the time for the completion of any such road shall be extended to the period of four years from and after the passing of this act."

The next clause provides "that all the provisions of the former act shall apply to and be in full force as regards any planked, macadamized, or blocked road, thereby authorised to be constructed, or to any railroad which the said company may in their discretion construct." And it is further enacted, "that, notwithstanding any thing in the former statute (6 William IV. chap. 65) contained, the capital stock in the said company shall not exceed in value 500,000*l.*, divided into shares of 5*l.* each; and it shall and may be lawful for the said company to sue for and recover the amount of any share or shares subscribed by any person or persons in the capital stock thereof, in any court having competent jurisdiction."



And this act is declared to be a public act, which all judges must judicially notice.

No doubt the legislature interposed upon the petition presented to them, with no other design than to advance a valuable public object; and there is as little doubt that they believed they would be affording no cause of complaint, so far as the petitioners were concerned, when they only granted such extended powers and made such alterations in the charter as they had themselves applied for.

How far it is reasonable to carry the principle, that all who embark in such undertakings must be bound by the acts and conform to the wishes of the majority, or of the actual governing body representing the whole, I will not pretend at present to determine. It would be no easy matter, I apprehend, to draw the line in a precise and satisfactory manner.

But there is one thing very certain, that where individuals do combine in an enterprise of this description and receive a charter with extensive powers, and accompanied of course with responsibilities, they make themselves the objects of legislation upon various grounds which may induce the legislature to interfere; and they run necessarily this risk, that when the legislature does pass an act for controlling or regulating their affairs, it becomes generally speaking a matter beyond the authority of any court of justice to deny to the provisions, whatever may be their plain effect, upon any idea, however well founded, that they do not seem reconcilable with either public or private claims.

Now when the legislature passed this last act, 8 Victoria, chap. 83, they were giving life to a company that upon a literal construction of the former charter was extinct; for the fact is upon the record in the fourth plea, and is not denied, that no double or single railroad, such as was contemplated by the first act, had been commenced within the three years allowed by that act.

The original charter contained in that act was by such omission utterly null and void.

Waiving all discussion of the question, whether those words in the first act had necessarily any other effect than to afford ground for a forfeiture, which might or might not be insisted upon as the government and legislature should think fit, I think it might upon mature reflection have occurred to the legislature, that to revive it after so long a period might operate inconveniently and unjustly as regarded some of the stockholders, who might not therefore desire it.

If there were any such, they might reasonably urge that it ought not to be assumed that they were prepared to fulfil engagements in 1847, which they had undertaken in 1837, upon the express understanding that they and all others were to accomplish the object desired within a certain period, or the thing was to be at an end.

A person having £1000 then to pay in, might in the mean time have applied it to other purposes, and not be able at any distance of time to resume a liability which the law had extinguished.

Then by extending the design, giving power to alter the points of termination and to substitute or to add works of another kind, the statute made so total a change in what the subscribers to the company had contemplated in the first instance, that it has a hard appearance to

hold any to their liability as stockholders who are not fully concurring in such changes.

The changes which the act authorises are indeed so extensive, that it would scarcely be a greater alteration of the original design, if the railroad stock had been allowed upon the prayer of the petitioners to be changed into canal stock.

If it had been suggested while the act was under consideration in the legislature, it would most probably have seemed reasonable to have allowed any of the shareholders who might not have confidence in the practicability or profitableness of any undertaking which the company might resolve upon in addition to the original design, or as a substitute for it, to withdraw their stock or not, as they might think proper. They might have had an option given to them to subscribe their shares anew in books to be issued under the late act, or to retire from the company, receiving back any of the money paid in by them on their stock which remained unexpended: or, taking a less liberal view of their case, the legislature might have held them bound to abide by what had already been done by them under the charter, and might merely have abstained from compelling them to go on under the new act if they preferred not doing so. In other words, they might have been suffered, if they chose, to forfeit their shares and lose what they had paid upon them, but not be forced to proceed any further against their will.

The 8 Victoria, chap. 83, does not, however, in fact, contain any such provisions; and though the considerations I have mentioned might usefully have engaged attention while the act was passing, we have now to deal with the act in the shape in which it has passed, and to give our judgment upon its legal effect, making allowance as we must for the ample powers of the legislature in all matters in which they are not controlled expressly by a higher authority than their own, or confined by some clear and undisputed constitutional principle.

Considering the nature of the subject—one completely within the scope of the colonial legislature—we have nothing to do but to ask ourselves what is the plain intent and meaning of the act; and having ascertained that, it will become our duty to give it effect.

The defendant contends that the company in which he was a shareholder had become extinct by the failure for so many years to commence the work; that the charter had in consequence become void under the express words of the first statute, and that there is now no authority in consequence to call for instalments, no company to bring actions for them, and no one liable to be sued. This raises the question whether there is now any such company in existence. We cannot, in my opinion, deny that there is.

The company had doubtless incurred a forfeiture of the charter, but the legislature and government were not bound to enforce it. They have in that respect done in this case what they have done in many others, allowed the failure to pass long unnoticed; and at length, upon the application of the company (or, if it be more correct to say so, of those who assumed still to be and act as the company), have relieved them from the penalty of their neglect, and given them a further time to *execute* their undertaking.

In this case it may be said, that what the legislature did, amounted to the revival of a body that had ceased to exist; but admitting that to be so, we have only to examine whether that was intended. If it were, we cannot deny that the legislature had power to do it. They not unfrequently revive acts of parliament that have expired, and which had been for a time as certainly and entirely non-existent as this company could have been, even if their delay had *ipso facto* put an end to their former charter.

There can be no doubt that the intention of the 8 Victoria, chap. 83, is to revive if it be necessary, and at all events to continue the company. They are recognized by the statute as then existing. No other corporation or body of men could have been referred to or contemplated, and the legislature expressly found their new provisions upon their petition. We must take that act as putting an end to all questions about there being such a company at the time of its passing.

Then when the legislature recited, as they have done, that the company have by their petition prayed, &c., they declare that all who formed part of the corporation concurred in the petition; for they make no exceptions; and the company includes all the shareholders for the purposes of this act, and in giving effect to its provisions we must take that to be a certain fact which is recited in it. We cannot allow it to be contradicted, and refuse, upon any allegation or proof that we can receive to the contrary, to carry its provisions into effect. So far as this act is concerned, the legislature stating the fact, is conclusive, though if it were attempted to affect other rights or interests of individuals, in any proceeding wholly apart from this act, by assuming as incontrovertible facts whatever might happen to be asserted in it, then I apprehend we should be clearly warranted by authority in holding individuals not to be bound by such recitals in any other respect than for the purposes of that act.

Besides, if the legislature had not declared themselves to be moved to passing the new statute by the petition of the company, but had nevertheless done it, we could not hold their act void, merely because it could be shown to be inconsiderate, or unreasonable, or unjust.

The few instances put, in which acts might be supposed to be passed, so utterly at variance with natural justice, and the inherent rights of individuals, that courts of justice could refuse to treat them as binding, are sufficient to shew us that it is not in a case of this kind, that such ground could be taken.

We could easily cite instances, both in the acts of our own legislature, and of the imperial parliament, in which alterations have been made in charters of trading associations, with or without the assent of the whole body, which would afford room for the same arguments and objections to the interference, as have been urged here. I would instance the cases of banks and of trading companies; and if such alterations are to be enforced upon dissentient stockholders in any such case, and if such acts can have effect, there is no power in this or any other court of justice to restrain the alteration within any certain limits which shall conform to their ideas of what may be reasonable and just.

I assume then, that the Toronto and Lake Huron Railroad Company, incorporated in 1836, still exists; that it is composed of those who



represent its stock, that its affairs are to be managed in accordance with the former statute, modified as it has been in any respect by the latter, and that this defendant and all who would have been stockholders and members of the company without dispute, if the first charter had been duly kept alive without legislative interposition, are now in like manner stockholders and members of the company by force of the late act; and we are not to conclude that the defendant, or any other stockholder, is prejudiced by that effect of the act, or has a right to complain, for we are to take it from the act, that what has been done has been done at their own request, and *volenti non fit injuria*; and besides as to the alterations, the act does not impose or prescribe them, it only enables the company to adopt them in their discretion.

The effect of the first clause extending the time I consider to be, that without any limitation as to the time of commencing, the company is now under the necessity of finishing the work within four years from the act passing.

The provision, that the stock shall not exceed in value 500,000*l.*, cannot be construed by us to have the effect of annihilating the old stock; the amount remains the same, and if it had been increased or diminished, that would have been an act within the power of the legislature; the only change is, that it is to be divided into shares of 5*l.* each, which might literally be carried into effect as regards the whole capital, and equally so as regards the 1000*l.* subscribed by the defendant. There may be some one or more stockholders holding an amount of stock which could not be divided into 5*l.* shares without leaving a fraction, as for instance, one share or any odd number of shares according to the old rate could not be; but we do not know that there are actually any such amounts of stock, and if the reasoning should apply, it would only affect half a share, and would be no argument for setting at nought what the legislature had done, nor warrant us in giving any forced construction to the act, contrary to its obvious meaning.

Then as to the provision mainly in question, namely, that part of the third clause which declares, "that it shall and may be lawful for the company to sue for and recover the amount of any share or shares subscribed by any person or persons in the capital stock thereof, in any court having competent jurisdiction." I cannot consider the effect of that more doubtful than of the other parts of the act; surely when the company petitioned the legislature to be allowed a longer time to go on with the work, they did not contemplate that the act which was to extend that indulgence to them, was to put an end to their existence altogether, or was to be grounded upon an assumption that they no longer existed; but there could be no company without shareholders, nor shareholders without stock; there could be no one to exercise the discretion which the act committed to the company, if the former stockholders were to be looked upon as out of the question, and we cannot suppose that those stockholders, when they petitioned for the new act, can have desired or expected that they were to form a distinct class from any future stockholders, and to be exempt from the legal remedy for enforcing payment of the unpaid stock. There could be no reasonable ground for such a distinction, if all concurred in petitioning for the extended charter, as we must suppose they did, (though the fact may indeed have been otherwise),

and the difficulty may be occasioned by an accidental omission to consider that circumstance.

The power given to the company to sue for the amount of "any share subscribed," has reference in my opinion to the old stock not paid up, as well as to any that might remain to be subscribed. According to plain grammatical construction, it would clearly apply to the stock already subscribed, for it is the past participle. To extend it to stock thereafter to be subscribed, would require apparently some latitude of construction; and I think it was correctly asserted by Mr. Harrison in his argument, that if it could only apply to one description of the stock, then it must be limited to the stock standing in the condition of "subscribed" stock when the act was passed, for it could not be denied that the language would embrace that.

Then as to the objections which have been urged to this action on other grounds, I see none to which we could on any clear ground give effect.

The two statutes must be taken together, and looked at as one statute, so far as may be necessary for giving reasonable and practicable effect to their provisions, and in this way I think we must admit that actions may be brought for instalments, as they may be called in, agreeably to the charter, and not for the whole amount of any person's share at once, as was argued upon the argument. It is true the 3rd clause of 8 Vic. ch. 83, says, "the amount of any share subscribed," that is that the whole amount may be collected, but not collected at one time and in one action.

We can see plainly that could not have been intended, for then none could be sued for till all had been called in; to read the act thus would be setting the strict import of its words above its evident spirit and meaning.

Then it does not appear to me indispensable, that any thing should have been done more than was done, in order to enable the company to sue for the instalment that had already been called in. The mere lapse of time can make no difference, when it cannot be set up, and is not set up as a defence under the statute of limitations.

Looking at the cases merely in reference to what the declaration discloses, I see no legal difficulty in the way of this action; the condition in which the stockholders have been placed by the last act, is certainly not satisfactory upon the view which we have of it, and various objections may be started, and were indeed urged upon the argument with much ability and force; but there may be more or less justice in the consequences which are assumed on the plaintiff's part to follow from the act, according to what has been done heretofore, and according to the understood position of the shareholders at the time of the act passing, none of which matters are legally before us.

The argument on the other side, founded on the declared will of the legislature, and the obligation on all to conform to it, was pressed with equal ability, and while we have all along felt the embarrassment arising from the absence of some more detailed provisions than happen to have been embodied in the last act, we could not omit to consider, that with regard to any shareholder inclined to adhere to his interest in the company, and his privileges as a member of it, it would be impossible to maintain in the face of the plain language and intention of 8 Vic. ch. 83,

that he was no longer a shareholder, and held no stock, and could not be recognized as one of the company.

We cannot tell to what extent the company may have availed themselves of the powers given to them by the first act; they may have acquired property and paid for it to a large amount, which must be now vested in them. The whole 500,000*l.*, for all we can judicially know, may have been subscribed years ago, and none may remain to be subscribed, in which case the company must consist of those who represent that stock, or there can be no company. The difficulties would be endless in attempting to maintain that there is now actually no such company, and it is sufficient to say that the legislature by their late act left no room for that to be questioned.

The greatest difficulty, as it seems to me, is created by the apparent fact, that there were no directors in existence when this action was instituted, but that does not indeed appear in the plaintiff's declaration. It need not be stated that there have been since 1837 or are now any directors, any more than it is stated in actions by banks or other companies, that they have an existing governing body which has directed the institution of the suit; the contrary does not appear in the declaration.

I consider the declaration sufficient.

With regard to the pleas, the fourth in my opinion is not a defence. The defendant is setting up a default, for which he is himself one of the parties answerable, as a reason why he should not pay his stock. If that could hold, then if the company had gone on in 1836, and contracted for the work, and their contractor had commenced or finished it a month later than the time limited by the act, every stockholder would be relieved from his obligation to pay for it.

The only effect the delay could have, would be to establish a ground of forfeiture which at the prayer of the company the legislature has waived, relieving them from a condition which they had imposed.

The 10th and 11th pleas are in my opinion bad for duplicity.

The 11th, for the purpose perhaps of meeting any possible answer which the plaintiffs might give to the supposed fact of the first statute having ceased to be in force, has set forth matters subsequent which should have been left to be brought out as answers to anything which the plaintiffs might set up as reviving the company; as these statements now stand on the plea, they leave us uncertain whether they are not separately relied upon as grounds of defence.

The 10th plea, though in a less degree, is I think clearly liable to the same objection of duplicity; as it is only in these pleas that the statement appears, that between 1837 and the filing the declaration, there has been no board of directors, and as that fact is badly pleaded in those pleas, we cannot treat it as admitted.

MACAULAY, J.—It seems impossible, after such repeated recognitions of the legislature, to hold the corporation at an end for non-user.

On the contrary the 8 Vic. 83, amended by 9 Vic. ch. 111, constitute implied revivals of the 6 Will. IV, ch. 5, and intermediate acts—a construction aided by the 8 Vic. ch. 86, sec. 8.

I think therefore we must look upon the company as existing, and the plaintiffs as a corporate body, with an extended time for finishing the road or roads they are empowered to construct.



We cannot hold to be *utterly null and void* a statute which the legislature treats as existing, and the provisions of which it has so recently amended and extended. And I think the plaintiffs may sue for the calls in question. This right is virtually conferred by the 7th Will. IV. ch. 63, sec. 6, and expressly by the 8 Vic. ch. 83.

These statutes creating corporations for such like purposes are looked upon as legislative contracts between the public and the company.

It is but a claim of forfeiture, and the condition in 6 Will. IV. ch. 5 sec. 25, is with a view to the public, not to enable the plaintiffs by a voluntary default to get rid of all their liabilities.

The cessation of the act, in the event of the road not being completed within ten years, might be of serious prejudice not only to the plaintiffs but to the public, and those through whose land the road passed, for it might be nine-tenths finished though not quite completed. But the 23rd sec. says it shall be null and void, and I suppose such effect would be given to it:—4 M. & W. 472; 5 Bro. P. C. 438. This disposes of the ground of general demurrer.

I do not think that the stock subscribed, can be regarded as extinguished for non-user: for though the 6 Will. IV. ch. 5, would be regarded as at an end, were it not for the 8 Vic. ch. 83, still the effect of its recognition thereby is to treat it as always subsisting—the forfeiture being in effect waived by the legislature.

The object of the condition subsequent, was to put an end to the privilege as against the public for non-user; but like other forfeitures it may be waived by the power that reserved it, and that has been done.

I do not see that it is necessary to aver the election of directors as objected. All that the plaintiffs can be required to shew on the face of the declaration is a compliance with whatever steps the act of incorporation required, to give a vested right of action to the calls sued for.

The call would seem to be revived by the revival of the act, or rather since the act is recognized as existing without revival, it must I apprehend be looked upon as continuing. At all events upon revival, all rights under it would seem equally to be revived.

With respect to the pleas, the fourth is bad if the company exists. It is consistent with this plea that a road was commenced the day after the expiration of the three years, and finished within ten years. The tenth and eleventh pleas seem to me to be bad on the grounds of demurrer assigned—4 Bing. N. S. 655; 6 Dowl. 737; 2 G. & D. 386.

JONES, J., sitting in the Practice Court during the argument, gave no judgment.

MCLEAN, J., concurred.

*Per Cur.*—Judgment for plaintiffs on demurrer.

#### THE QUEEN V. DAVID JOHN SMITH, TREASURER OF THE MIDLAND DISTRICT.

At a session in Oct. 1846, A. was elected by the District Council of the Midland District, treasurer of the district; when elected A. was *himself* a *district councillor*; B. at the time of A.'s election was holding the same office of treasurer to the district, having been long previously appointed to that office by royal commission. A. upon his election requested B. to give him the

books, &c., of office. B. refused upon the grounds, that under the District Council Acts 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, A. had been elected treasurer at a time and session when by law no such election could take place; and that the two offices of district councillor and treasurer were incompatible. Upon B.'s refusal A. applied to the court for a mandamus to B. to deliver the books, &c.

*Held, per Cur.* 1st, that A. had been elected at the proper time and session. 2ndly, that the two offices were incompatible. 3rdly, that A. was ineligible for election, the council having no power to receive his resignation as councillor, 4thly, that notwithstanding A.'s irregular election, he, as the *treasurer de facto*, under the act 9 Vic. c. 40, had a legal right to the books, &c. of his office: and that a mandamus might go to B. for the delivery of the books, &c., to A., he being since A.'s election under the act a mere stranger to the office.

In Hilary Term last, the court granted a mandamus *nisi* to David John Smith, Esquire, late treasurer of the Midland District, commanding him to deliver to the auditors of the Midland District, an account of the moneys received and expended by him as treasurer of the Midland District, during the then last quarter of the year ending 31st December, 1846; and to pay over to William Fergusson, Esquire, treasurer of the Midland District, the balance of such monies, and all other monies of the Midland District remaining in his hands, and to deliver over to the said William Fergusson all the books and papers in his hands, belonging to the said office of treasurer.

Mr. Smith, the late treasurer, filed his return to this writ on the first day of Easter Term, setting forth in substance, that on the 5th February, 1842, he was appointed treasurer of the Midland District, by commission under the great seal of the province, and gave the security required by law; that he entered upon his said office, and "has continued ever since "to hold the office, and discharge the duties under and by virtue of his "said appointment."

The commission to him was to hold during her Majesty's pleasure, and he stated that he had never been discharged from the office, or received any intimation that it was her Majesty's pleasure that he should hold it no longer; that he had never vacated or resigned the office; and that his surety bonds remain in force against him. That the first meeting of the Municipal Council of the Midland District, held after the passing of the 9th Vic. ch. 40, entitled, "An act to amend the laws "relative to district councils in Upper Canada," was holden at Kingston, on the 11th day of August, 1846, being the second Tuesday in the month of August; that at that meeting the council did not select by the majority of their votes or otherwise, a person to be treasurer, but adjourned their meeting without doing so; that the second meeting was held on the 6th of Oct., 1846; that at the township meeting for the township of Pittsburg, held on the first Monday in January, 1846, William Fergusson was duly chosen a councillor for the said township, to serve in the district council for three years, and took his seat, and took and subscribed the oaths according to law; that at the meeting of the district council held on the 6th Oct., 1846, being the second meeting of the district council held after the passing of the statute 9 Vic. ch. 40, and the fourth after the said William Fergusson had been elected a member of the district council, and while he was serving and acting as such, two years of the period for which he was chosen being yet unexpired, the said William Fergusson was *selected* by a majority of the votes of the district council to be treasurer of the Midland District; that after he had been so selected as

treasurer, he continued for several days at the said last-mentioned meeting, to vote in the said council, and to act and take part in their proceedings, namely, on the 7th, 8th and 9th days of Oct., 1846.

And the defendant relied upon the facts, that William Fergusson was "selected" not at the first, but at the second meeting of the district council after the passing of the act; and that at the time of his being selected he was a member of the district council, as making his selection or appointment void.

He set out further, that on the 1st January, 1847, he had delivered to the auditors appointed according to law, an account of all the moneys received and expended by him as treasurer, during the quarter ending on 31st December, 1846, and he annexed a copy of such account, which shewed a balance in his hands of 2470*l.* 2*s.* 10*d.* on that day.

This was the substance of the return.

In the affidavits upon which the mandamus was obtained, and in affidavits filed on the other side, other facts were stated which it was supposed might have weight in granting or refusing the writ.

*The Hon. S. B. Harrison, Campbell and Burrowes*, moved to quash the return to the mandamus. They referred to the District Council Acts 9 Vic. ch. 40; 4 & 5 Vic. ch. 10; and 4 B. & Ad. 9; 7 B. & C. 643; Dougl. 383, n. 22; 2 T. R. 779; 3 Burr. 1616; 2 T. R. 88; 1 Lord Raymond, 563; 2 ib. 1304; Com. Dig. Franchise, 40; Wilcocks on Corporations, 610, 624.

*Hagarty and McKenzie* shewed cause, and referred to 5 Bing. 180; 4 B. & Ad. 9; 5 A. & E. N. S. 548; 2 A. & E. N. S. 460.

The various points raised in argument by counsel, are fully given in the judgment of the Chief Justice.

ROBINSON, C. J.—We must dispose of the case upon the return. The question is, whether that presents any valid reasons why the late treasurer should not be compelled to surrender up the books and papers belonging to the office of treasurer, and to pay over the balance of the district revenue remaining in his hands.

Mr. Smith urges as his reason, that there has not been a treasurer duly appointed to succeed him; he does not deny that Mr. Fergusson has been in fact chosen by the district council, and is in the actual execution of the duties of the office, so far as they can sustain him, neither does he deny that under the new act 9 Vic. ch. 40, the district council had the power to elect a person to fill the office. (I call it an *election*, because the mode of appointment by the votes of the council does in fact amount to that, though for some reason the legislature has chosen to call it by the less common name of a *selection*.)

But it is contended by the late treasurer, that the council have not duly elected a treasurer to succeed him, for that, 1st, they did not elect Mr. Fergusson on the day appointed by the statute; and 2ndly, because Mr. Fergusson being at the time of his election a member of the district council, and serving in that capacity, he was ineligible to the office of treasurer.

As to the first reason, the act was passed 9th June, 1846, that is, it was assented to on that day, but by the 21st clause it is provided that the "act shall come into effect upon, from, and after the third Monday "in August then next."



The 7th clause enacts, "that at the first meeting of district or municipal councils after the passing of this act, a district treasurer shall be selected by the majority of the votes of any district or municipal council, anything in the 29th section of the former act (4 & 5 Vic. ch. 10,) to the contrary notwithstanding, and shall be subject to *re-election* at the expiration of every three years, and at the end of three years the council, if they shall see fit, may select any other person to be treasurer, and that in any vacancy in the office of treasurer, by death or otherwise, during the recess of the council, the warden may and shall summon an extra meeting of the council, for the purpose of selecting a treasurer as aforesaid."

The 8th clause enacts, "that any treasurer selected by the provisions of this act, shall before he enters on the duties of the said office, give security for the safe keeping and the lawful application of all monies which shall come into his hands by virtue of any act of the legislature, or of any by-laws of the municipal or district councils; such security to be in certain sums specified, and to be approved of by the council."

This is in substance all that the new act contains, respecting the office of treasurer.

The warden and the district clerk, who under the first act had been chosen by the crown, are under this act to be elected by the council.

With regard to the warden it is provided by the fourth section, that the warden who had been appointed by the government for each district, shall go out of office from the time when a warden shall be appointed for such district, under the provisions of this act; and the same is provided respecting the district clerk; but it will be found, that with respect to the *going out of office* of the treasurers who had been holding office under appointments by the governor, nothing is expressly said.

As regards the times of meeting, the 4th & 5th Vic. ch. 10, (sec. 22,) had appointed them to be on the second Tuesdays in February, May, August and November in each year, and to last six days; the last act 9 Vic. ch. 40, repeals this, and appoints but two ordinary meetings in each year, namely, on the first Tuesdays in February and October; each to last for nine days. And the same clause (11) provides that any thing which by the said act, 4 & 5 Vic. ch. 10, or the by-laws of any district council, shall have been appointed to be done at the quarterly meeting, which without this act (*viz.*, 9 Vic. ch. 40) would have been held in the month of August or of November, shall and may be done at the half-yearly meeting to be held in the month of October in the same year.

I consider it too plain to admit of argument, that the district council could not proceed to elect a treasurer under the new act until it came into force; in other words, not till after the *third Monday in August*, 1846. They could not therefore have legally elected him at any meeting which they might have held, legally or not, on the second Tuesday in August, 1846. And it is equally plain, I think, that the legislature intended their new act so far to take effect before the *third Monday in August*, 1846, as to render any quarterly meeting on the second Tuesday of that month unnecessary. But whether, from the imperfect manner in which the statute is framed in this respect, it may have been considered legal and necessary or not to hold a meeting under the old act, on the second Tuesday in August, because the new act, abolishing that arrangement, was not to take effect until

the third Monday of that month, it is evident that that meeting must have been held for no sensible purpose; for every thing which they could have done at such a meeting under the old act, must, according to the 11th clause of the new act, have been deferred to the first half-yearly meeting in October following; and whatever there might be to be done under the new act, towards electing a treasurer, could not be done until the authority for such election under the new act came into force, and that could not be in time for any quarterly meeting that it might be supposed necessary to hold in August, in consequence of the inconsistency between the letter and the intention of the new act.

The election of treasurer, in my opinion, could only be made at the session in October, being the first session after *the act came into force*. The meaning of the act is plain: it was not intended that there should be any regular meeting before October, 1846—though there is an omission in the statute which creates an apparent inconsistency.

Then, as to the second point—that Mr. Fergusson, whom the District Council did elect in October, was ineligible—the statute 4 & 5 Vic. chap. 10, sec. 12, provides, “that no person accountable for the district monies, nor any person receiving any pecuniary allowance from the district for his services, shall be qualified to be elected a councillor in any District Council to be constituted under this act;” and in the 14th clause it is provided, that every person duly qualified, who shall be elected a district councillor, shall accept the office or pay a fine of £10. No power to resign the office of district councillor is given by the act.

The treasurers of districts, who had been formerly appointed by the justices of the peace, were by the 29th clause of 4 & 5 Vic. ch. 10, to be appointed by the governor, to hold their office *during pleasure*; and he was to be under the control of and accountable to the district councils touching all matters and things within the jurisdiction of the councils.

The 38th clause of 4 & 5 Victoria, ch. 10, enacts that it shall not be lawful for any person to hold at the same time *more than* one of the district offices thereby created; by which I take to be meant the offices of clerk, treasurer, auditors and district surveyor, and perhaps also the warden of the council.

Upon these provisions, and on the general principles of law, it has been argued that the offices of a district councillor and a district treasurer are incompatible.

I think they are, in the first place, on account of the repugnancy and impolicy of the office of treasurer, which is a subordinate and merely ministerial office, held under the council, being in the hands of a member of the council which is to direct and control him.

This would have compelled us, in my opinion, to hold them incompatible, if the statutes referred to had contained no particular indication of the intention of the legislature on that subject. We could not have done otherwise without opposing the decision of the Court of Queen's Bench in England, in the case of *The King v Paterson*, 4 B. & Ald. 9, and the numerous authorities by which it is supported.

But, in the next place, I consider that the 4th and 5th Vic. chap. 10, does contain unequivocal indications of the intention of the legislature, that the offices of district councillor and treasurer shall not be held at the same time by the same person.

It would be inconsistent with the provision in the 12th clause. When that was passed, the right of appointment of treasurer was to be thenceforward in the governor; and I conceive if the governor had appointed a district councillor treasurer, such an appointment would have been in opposition to the spirit and intention of the act; and the only question would have been, whether such an appointment being made, the member of the council, by accepting and acting in the office, could be held to have virtually surrendered his office of councillor, so that he might thereafter hold the office of treasurer alone. If that effect could not be legally held to have followed, then I consider that the consequence must have been, that if he must still continue to hold the office of councillor, his appointment of treasurer must have been held to be illegal, as being contrary to the plain intent of the statute, in the clause which I have referred to, that the two offices shall not be in the same hands. It would be absurd to suppose that the legislature could mean to allow a person to be appointed treasurer after he had become councillor, and to continue to hold it with the office of councillor, while they were clearly disabling any one who was holding the treasurership from being chosen to the office of councillor.

It is impossible to hold otherwise than that the offices are incompatible; but the question is not so much upon their incompatibility, as upon the legal consequences of the attempt to place the existing member of the council in the incompatible office.

It has been argued that, by accepting the office of treasurer and acting in it, he may be taken (if the offices are incompatible) to have surrendered or vacated that of district councillor, in which case there can be no legal difficulty in the way of his retaining the other. I do not conceive that to be the effect, but am of opinion that, looking at the provisions of the statute, and considering the reason of the thing, the language of the court in the case which I have already cited, of the *Queen v. Patterson*, would well warrant us in holding that a member of the district council is ineligible to the office of treasurer, inasmuch as it is plain they cannot be lawfully held together; and there is no discretion in the member of the council to avoid his office by his own act of resigning, nor any discretion in the other members of the council, with whom he is serving, and by whom he was not appointed, to accept his resignation.

But I content myself with merely expressing this opinion, without entering into arguments to support it; for it is clear to me—taking it to be undoubted that Mr. Fergusson was not eligible when he was chosen, and that the office was therefore not legally conferred upon him, and cannot be holden by him if his title should be brought in question directly and upon a proper proceeding—yet that the late treasurer has nothing to do with the question of his eligibility, or the legality of his election—no more to do with it, at least, than any other inhabitant of the district has. He was to hold his office under his commission during the Queen's pleasure. The Queen, through her governor, assented afterwards to a statute which introduced a different tenure of office, and a different mode of appointment to it; and this new system was to take the place of the old upon the first occasion of the council meeting under the new act.



They did meet in October last, and proceeded then (at the right time, I think) to elect a treasurer, and they did make an election; from which moment, in my opinion, the new tenure of office and new method of appointment came into force, and the defendant on this appointment ceased to be treasurer, and has no more interest in the question than any stranger has.

Taking the ineligibility of Mr. Fergusson to be clear, the strongest effect that could have would be to make the election void, and the office vacant; in which case the 7th clause of the new act would make it the duty of the district council to proceed at once to the election of another treasurer.

The late treasurer's interest in his office was put an end to, the moment the council proceeded to an election under the new law, and their making a void or voidable election, cannot set him up again as a treasurer holding office under the governor's commission.

If a district council having made an election illegal on any ground, shall persist in maintaining it, the case is not without remedy upon a proper proceeding instituted for trying the validity of the election, but so long as the person chosen is in the actual discharge of the duties, sworn and admitted into office, and recognized by the district council as the treasurer, there can be no reason which will warrant the late treasurer, who certainly in my opinion is not now treasurer, in refusing to give up the books and papers of the office, and any balance of money remaining in his hands.

These are the property of the district—the late treasurer has no ground for retaining them, for he is relieved from responsibility the moment he places them in the hands of the person who, regularly or not, has been appointed by the council to succeed him.

Upon any other principle of proceeding, the public affairs of the district would be exposed to great inconvenience and confusion.

If by any disregard of the law, accidental or otherwise, a person has been placed in office, who cannot by law hold it, things must take their due course—the illegality must be ascertained and pronounced upon in a proper proceeding instituted to try the question; and in the meantime, the person whom the district council has actually elected treasurer, and who is treasurer for other purposes, must be treasurer also so far as the custody of the books and documents and monies is concerned, which are required to be in the office of the treasurer.

I have no doubt, and indeed that was fully admitted in the argument, that the late treasurer has not from any improper motive withheld the delivery of the books and monies in his hands, but because he has considered that it was incumbent on him to see that the district council has legally elected his successor.

It is not intimated that the council entertains any dissatisfaction in regard to the late treasurer with respect to the state of his accounts, or any doubt of his ability and readiness to pay over the just balance in his hands when directed to do so.

But in the mean time it is pressed upon us (and we may easily suppose it must be so), that great inconvenience is felt from the refusal of the late treasurer to give up what belongs to the office.

It is necessary, I think, that he should do so, for it is not in this

indirect manner that the legality of appointments or elections is to be questioned, but by *quo warranto*, or in cases of merely colourable elections, a mandamus to the council to proceed to another election, in which case the person actually filling the office, though upon such void and colourable election, must be made a party to the rule, that he may be heard in defence of his right, as in *Rex v. Baker*, 3 Burr. 1452.

But those who had been treasurers under the old law have no more interest in the office than strangers have, from the time that other treasurers have regularly or irregularly been chosen to the office, and it would seem as reasonable in the case of any other void election, that the last incumbent should claim a right to resume his duties, as that the late treasurers should withhold the papers of the office till they are satisfied with the legality of the elections of their successors.

In the case of *Milward v. Thatcher*, 2 T. R. 81, which in its material features is much like the present—the point of eligibility of a person to the office of town clerk of Hastings, while he was at the same time a jurat of the corporation, was tried upon issues directed by the Court of Queen's Bench—and in that case Mr. Justice Buller, in the course of his judgment, remarks upon the effect of an actual election to an office, however clearly illegal. “Suppose (he says) a person were ‘criminally convicted in a court of record, and the recorder of such court were not duly elected, the conviction would still be good in law, ‘he being the judge *de facto*.’”

So here the election has undoubtedly had the effect of putting an end to the late treasurer's tenure of office, since it has constituted Mr. Ferguson the treasurer *de facto*.

Till his election has been declared void upon a proper proceeding, all payments made by him will acquit the corporation, and all payments made to him will be binding on the corporation, and acquit the parties paying; and this being so, he surely should be in possession of the books and accounts, and whatever else is necessary for enabling him to act efficiently and with safety to the public.

The case of the *King v. Bristow*, 6 M. 168, raises a doubt whether we ought to grant a mandamus in this case to a person who had filled the mere ministerial and subordinate office of treasurer, or leave the council to pursue another remedy; but we have not felt it necessary to consider that scrupulously, because it was intimated on the argument, that all that was required was an expression of the opinion of the court upon the obligation of Mr. Smith to give up the documents and pay over the monies, and that it would be readily acquiesced in; and at any rate this remedy in such cases seems not an improper one, for the object desired is a specific one, and it is of importance to the public that it should be speedily and absolutely obtained.

In *Rex v. Clapham*, 1 Wils. 305, a mandamus was granted to oblige the old overseer of the poor to deliver over the books of the poor rates to the new overseer, for *per Cur.* “they are public books, and ought to be ‘delivered over by one overseer to another, that all the parishioners ‘may have access to them, and the overseer and churchwarden for the ‘time being ought to have the custody thereof.’”

MACAULAY, J.—I think the selection of a treasurer was made at the first regular meeting of the district council, under 9 Vic. c. 40, and that

although there is an incompatibility in one of the council holding also the office of treasurer, amounting to a disqualification, because a councillor cannot resign or vacate his seat by the acceptance of an office under the council; still it appears to me that however irregularly a treasurer was selected under the late act, if he gave the securities required by law and was sworn into office, he thereby became treasurer *de facto*, and Mr. Smith's appointment of treasurer thereupon ceased.

Indeed, it is by no means clear that it did not cease by implication upon the first meeting of the council under the statute, although no selection had been made, for the act provides, sec. 7, that in any vacancy in the office of treasurer, by death or otherwise, during the recess of the council, the warden shall call an extra meeting to make a selection, and if not made when by law required, a mandamus might be issued to enforce a compliance with the statute.

There is no provision for continuing the former treasurer till a successor be appointed, and if there were, it appears to me that one was selected, though irregularly.

Had Mr. Fergusson continued to exercise the functions of councillor also, the case would be different from what it is, but he relinquished the councillorship forthwith on accepting the new appointment, and whether regularly or not, a successor has been elected, and fills the office of councillor for the township of Pittsburg. Both offices are not therefore held by the same person, and the want of regularity in his appointment to the treasurership might be rectified by a renewed nomination, were he ousted from that office, or regarded as not in fact filling it, but I think he is treasurer in fact, and entitled to discharge the duties of the office accordingly.

It might be questioned whether the council have not a clear remedy for the money by action, but the mandamus has not been resisted on this ground.—*Rex v. Godwin*, Dig. 598, (22); *Milward v. Thatcher*, 2 T. R. 81; *Rex v. Pateman*, 2 M. 777; *Rex v. Paterson*, 4 B. & Adol. 9.

MCLEAN, J., concurred.

JONES, J., gave no judgment.

*Per Cur.*—Mandamus ordered.

#### DANIEL PERRY v. THE BRITISH AMERICA FIRE AND LIFE ASSURANCE COMPANY.

Where a party assuring a vessel *omits* to mention to the underwriters that she has *then* sailed, the omission, though the assured knew the fact, will not vitiate the policy, unless the vessel be, at the time of insurance, what is called "a missing ship". *Aliter*, if the assured, when *expressly questioned* by the underwriters as to that fact, says, not *by way of opinion or expectation*, but *positively*, that the vessel has not yet sailed, when she really has. *Semble*, that there is a distinction to be taken, when the owner of the cargo, who is not at the same time the owner of the vessel, is insuring his cargo, as to the probability of any positive statement being made to the underwriters, with respect to the time of the vessel's sailing.

This was an action of assumpsit on a policy of insurance on a cargo of wheat, shipped on board of the schooner John Miller.

The declaration charged the adventure as "beginning from the port "of Port Credit, and continuing from thence to the port of Kingston, on



"Lake Ontario," and that the defendants "became insurers of the sum "of 250*l.* upon the said wheat, in the said vessel on the said voyage." It averred that the policy was made on the 9th October, 1846; that on that day (under a *videlicet*.) the wheat had been and was shipped in good order at Port Credit, on board the said schooner, to be carried therein from the said Port Credit to Kingston; that on the 7th day of October, the schooner, with the wheat on board, sailed on the voyage from Port Credit to Kingston; and that on the 13th day of October she was totally lost while proceeding on the said voyage, being stranded on the shore of Lake Ontario, whereby the wheat was destroyed, &c.

The defendants pleaded, that "they subscribed the policy and made "the promise in the declaration mentioned, after the schooner had sailed "on the voyage in the policy mentioned, and that the policy was obtained "by the fraud, falsehood and misrepresentation of the plaintiff, as to, and "concerning the time of sailing of the schooner, and by the fraudulent "concealment from the defendants by the plaintiff, of certain facts and "information, which before and at the time of procuring the policy and "subscription, were *known to the plaintiff*, and were then material to be "known by, and ought to have been communicated to the defendants, "to wit, amongst other things, as to, and concerning the time of sailing of "the said schooner."

To this the plaintiff replied *de injuriâ*.

The policy was made 9th October, 1846, risk commencing from the port of Port Credit, and continuing from thence to the port of Kingston.

It was in the ordinary form of such policies, where the risk is taken from port to port, and contained many conditions which gave rise to no question in this case, one of which is, that "if the voyage shall have "begun, and shall have terminated before the date of the policy, then "there shall be no return of premium on account of such termination of "the voyage."

The insurance was proved to have been effected by a gentleman acting for the consignees, upon instructions conveyed in a letter from the plaintiff, dated at Oakville, a few miles from Port Credit, on the 8th of October, 1846, in which he enclosed a copy of the bill of lading, shewing the wheat to have been shipped on board of the John Miller at Port Credit, on the 7th of October, and says, "inclosed you will be pleased to receive "the duplicate of bill of lading as per understanding yesterday, which "please insure, and oblige yours, &c."

The agent was examined at the trial, and swore that at the time of making the insurance, he exhibited this letter to the managing director.

On behalf of the defendants the evidence was, that the business was transacted by his going to the clerk of that department of the office, and shewing the bill of lading; that he was asked where the vessel then was, and he replied "he supposed at Port Credit ready to sail."

The agent on the other hand declared, that no inquiry was made of him on that point, that he had no knowledge where the schooner was, and could have given no information if he had been asked.

The defendants gave evidence, that upon ordinary risks from port to port, when the vessel had not sailed, the policy is made out as of course by the proper clerk, and taken by him to the managing director to sign; that when an application is made to insure a vessel or cargo after the

voyage has been commenced, the policy is never thus granted as of course, but the risk is first submitted to the managing committee, and either taken or not as they may determine; that when a vessel is known to have been out for some time on the lake, especially in tempestuous weather in the autumn, the risk would very probably be declined; but that if it is taken at all, it would be at the general rate of premiums; that this risk was assumed and supposed to be upon a vessel which had not yet sailed, and therefore the policy was in the common form, and not confining the risk to the date of the policy, as would have been done if it had been taken with the understanding that the schooner had sailed.

This was only proved in order to shew, that from the time of the policy, the defendants must have understood that they were not taking a risk upon a vessel that had been for some time afloat on the lake, and whose position at the time of granting the policy was unknown.

In point of fact the "John Miller" did sail on the *seventh* of October, and meeting with strong adverse winds after she had passed Toronto, returned to that harbour, and came to anchor in the offing, and sailed again sometime on the 9th of October, and was again compelled to put back, and proceeding again on her way down the lake, was stranded on the 13th of October, on the south shore of Lake Ontario, and the cargo lost or destroyed.

The master was examined as a witness on the trial, and swore that the vessel was staunch and safe at the time of the insurance being effected, and complete in all her necessary equipments.

When the loss was reported, the company wrote to the plaintiff inquiring into the facts in regard to the time of the vessel's sailing, and he replied "that when he left Port Credit on the 7th, the vessel was "then lying at the wharf, and he did not know whether she was to sail "on that or on the following day."

The defendants contended at the trial, that it was evident from this letter of the plaintiff that he had reason to believe, and was under the impression, that she had sailed *at latest on the eighth*, and that they should have been acquainted with that fact when they were asked to take the risk on the 9th of October.

The jury on this evidence gave a verdict for the plaintiff, for the full amount of his policy.

*J. Lukin Robinson* moved for a new trial, on the law and evidence and for misdirection; he referred to Smith L. C. 360; 2 Str. 1183; 1 B. & Ad. 672; 1 Esp. C. 373; 1 Esp. 407; 2 N. R. 14; 1 M. & S. 15; 5 Taunt. 359; 8 Bing. 198; (Duer on Insurance).

*J. H. Hagarty* shewed cause; he relied upon the following authorities, Park on Insurance, 10th chap.; 3 Taunt. 381; 2 M. & W. 267; Park. 414, 435; 1 Bl. Rep. 593; Doug. 292.

ROBINSON, C. J.—It appeared to me on the trial, that if the fact really was as one of the clerks, Mr. Stuart, declared it to be, that Mr. Heward, the agent in effecting the insurance, was asked, when he proposed the risk, where the vessel then was, and that he replied she was lying at Port Credit, so that it could be justly said the risk was taken under that impression, into which the company was led after inquiry made of the agent, then that they were not bound to bear the loss, the fact being that the vessel, instead of being at Port Credit when insured, had been nearly two days

out, exposed to strong winds which then prevailed, which might in the judgment of the defendants have had a material effect upon the risk, and might have influenced them in determining to take or decline it, if not in regard to the amount of premium to be charged.

There were some points on which I had no doubt at the trial, and which I find on examination are free from doubt.

I stated to the jury, that whatever the person assured was informed of that was material to the risk, he was bound to communicate to his agent; that Mr. Heward therefore must be assumed to have known what the principal knew in regard to the ship's sailing, (whether he did in fact know it or not), for that the insurers are not to be prejudiced by the fact of his employing an agent, and giving him defective instructions; there is no doubt the law is so.

I told the jury also, that if either the assured or his agent knew any fact which it was plainly their duty to communicate, and they failed to do so, the concealment or omission would equally invalidate the policy, whether it arose from accident or design. This is also a well settled principle; the case of *Fitzherbert v. Mather*, 1 T. R., is express on both of these points, and also *Bridges v. Hunter*, 1 M. & S. 15, and there are others to the same effect.

The fact of the vessel having sailed, might or might not in the opinion of the jury be material to the risk.

If the defendants expressly enquired about that fact, then in my opinion it would be proper to conclude that they regarded it as material, and had therefore a right to the information in estimating the risk, whether it might appear to others to be material or not; and if the fact were clear and certain, that they put the question and received an answer, not expressed as a mere opinion of what the agent believed and thought probable, but of what he assumed to know, then it appeared to me, and it still is my opinion, that it became of no consequence to enquire whether the agent misled the defendants ignorantly or by design, or whether the fact of the vessel sailing when she did, had or had not any influence in incurring the risk.

The charge to the jury was to that effect, and they found for the plaintiff, giving him a verdict for the sum insured.

I fully concur with my brothers in thinking that we ought not to disturb the verdict; for, in the first place, as to the facts, the evidence of the clerk or agent for the company, and of the agent of the assured, was conflicting as to what took place at the time of the insurance being effected—everything depended upon that, and the question in such cases must be determined by the jury. The court have no right to determine that one witness shall be believed in preference to another.

And, in the next place, there are considerations which either did not engage attention at the trial, or which were not allowed their due weight, and which tend strongly if not conclusively to support the verdict, even if the jury were not convinced, as I suppose they were, that the facts were precisely such as the plaintiff's agent described them. First, the time of sailing does not seem to have been known to the plaintiff Perry; he was in the country—not where the vessel was. We have no other proof of his information on the point, than is to be inferred from the letter which he wrote after the loss had happened; and when



that is duly considered, it amounts only to an expression of what he expected or thought probable, it does not shew that he knew the vessel had sailed before the 9th.

If that letter had been written before the insurance to the plaintiff's agent, and had been shewn to the insurers, it would only have informed them of what the plaintiff *believed*. If they thought the fact material, they must have taken other steps to inform themselves before they would have a right to feel certain of the fact; and if they forbore to make further inquiries, it would shew that they were content to take the risk without any certainty on that point. The case of *Hubbard v. Glover*, 3 Camp. 312, proceeded on that principle.

Then, in the next place, it is material that this plaintiff was only owner of the cargo or part of the cargo, not owner or master of the vessel, and therefore that having no controul over the sailing of the ship, he could not in fairness be understood as making any positive engagement or statement on the subject. *Bowden v. Vaughan*, 10 E. R. 415, is a case (I believe, the first one) in which that distinction was taken, but it has been acquiesced in as a just and reasonable distinction, and it seems to me to be so.

Now, these are facts which could not be altered on another trial, and therefore there is no reason why this verdict should be interfered with.

If there had not been these facts in the case, and we had found it necessary to decide it upon the mere question, whether the misrepresentation that a vessel on which it was proposed to effect an insurance had not yet sailed, when in fact she had, would or would not avoid the policy, then I take it we should have found ourselves warranted by the effect of the decisions down to the present time, in holding, that if the insurers had before taking the risk made the inquiry and had been misinformed, they could not have been compelled to make good the loss—but that if no inquiry had been made by them, and the fact had merely been that the insurers had been allowed to take the risk, without anything being said on the subject, while the assured knew that the vessel had in fact sailed, but omitted, whether intentionally or otherwise, to state it, such omission would not avoid the policy, unless the ship was at the time what is called a missing ship—that is, had been so long out that according to the rule of computation for the voyage she ought to have arrived, but had not been heard of. The cases of *Fort v. Lee*, 3 Taunton, 381, and *Foley v. Moline*, 5 Taunton, 430, lay down that doctrine. It is recognized in the later case of *Elton v. Larkins*, 5 C. & P. 385, in which Lord Chief Justice Tindal says, "The law clearly is, that a party is not bound to communicate the time of sailing of a ship, unless at the time of effecting the policy the ship is what is called a missing ship. If the underwriter inquires, and a false answer is given, that will vitiate the policy, but it is not generally necessary *a priori* that the assured should communicate the time of sailing."

In *Fillis v. Brutton*, 1 Park on Insurance, 414, Lord Mansfield held the law to be otherwise. "In all insurances (he said) it is essential to the contract that the assured should represent the true state of his ship to the best of his knowledge, for on that information the underwriters engage." The difference in the time of sailing was only one day, and it was not proved or alleged to be material, and the case did

not turn on any actual fraud, but his lordship told the jury—"In this insurance the only material point is this, had the vessel sailed or was she in port?" *Shirly v. Wilkinson*, 1 Dougl. 306, was a decision similar in effect; and at a much later period, in *Bridges v. Hunter*, 1 M. & S. 15, Mr. Justice Le Blanc laid down the rule as universal. "I believe (he said) it has always been considered that the time of the ship's sailing, if known to the assured, is a material fact to be communicated to the underwriter;" and without reference to the enquiry whether the time of sailing was or was not likely to have had an effect in producing the misfortune, or whether it would or would not have seemed to the insurers to be material, or to the jury upon the trial, the necessity of stating what is known upon that point has, in England, been at former periods laid down by eminent judges in very strong terms, and in some of the commercial countries of Europe it has been made absolutely essential in all cases to the validity of the policy.

I mention these things only as bearing on the general question in such cases. So far as the case before us is concerned, I am clear that the verdict should stand, because the evidence respecting any question being asked, and any misrepresentation being made as to the vessel being in port, was contradictory and inconclusive, and because I consider it to be now settled, that even in general the fact of omitting to mention that the vessel had sailed when it was known to the assured, would not vitiate the policy, unless she was then a "missing ship;" and in this particular case, the assured had nothing to do with the sailing of the vessel, could not controul it, and could only speak of it as a matter of opinion and expectation.

Of course it must not be understood that the right to recover in this case would not have been affected by the concealment of any circumstance known to the assured that was clearly material to the risk, such as the vessel having been damaged, or anything having occurred that might create alarm for her safety.—3 Burr. 1909; 1 Esp. 407.

MACAULAY, J.—Upon the authorities, and the evidence, I think the plaintiff is entitled to recover.

He was owner of the goods shipped on board of the vessel, not of the vessel itself; and there is no pretence for ascribing a fraudulent concealment to him or to his agent in effecting the insurance.

The plea is a *fraudulent* concealment—not merely a concealment or non-communication of what was material to be, and ought to have been, communicated at the time; but even were it the latter, the authorities do not seem to require that the time of sailing should be mentioned, though known, by the insurer of goods on board, unless the vessel be overdue, or some peculiar facts or circumstances, which do not appear in this case, may exist, calculated to affect the risk or the amount of premium.—3 Taunt. 381; 5 Taunt. 430.

McLEAN, J., concurred.

JONES, J., being in the Practice Court during the argument, gave no judgment.

*Per Cur.*—Rule discharged.

## QUEEN'S BENCH.

JUDGMENTS OF THE COURT DELIVERED AT THE SITTINGS  
AFTER HILARY TERM, AUGUST, 1847.

---

Present,—THE HON. J. B. ROBINSON, C. J.  
THE HON. MR. JUSTICE MACAULAY.  
THE HON. MR. JUSTICE JONES.

THE HON. MR. JUSTICE MCLEAN in the Practice Court.  
THE HON. MR. JUSTICE DRAPER absent in England.

---

### COMMERCIAL BANK v. ECCLES.

A notice of the non-payment of a bill or note, when deposited in the post-office of the city of Toronto for any endorser residing there, is as good a notice, as if it had been left at the endorser's residence, by a special messenger.

The defendant was sued as indorser of three bills of exchange, drawn in this country, upon J. Ramsay, Esq., in Ireland, in favour of the defendant's order.

He pleaded, as to all the counts, that he had not due notice of presentment and non-payment of the bills respectively.

The evidence was, that on the same days that the protests were received, a notice of each respectively was written and addressed to the defendant, and mailed in the post-office in the city of Toronto, in which city the defendant resided.

The bank messenger who put the notice into the post, swore that he had on other occasions gone to the defendant's office (who is an attorney and barrister), and did not find him at home; and that he put these notices into the post-office in order that he might be more certain of their reaching him.

It was objected for the defendant, that the putting a notice into the general post-office of the town in which the defendant resides, was not legal notice; that it ought to be taken to his dwelling house, or to his place of business.

A verdict was rendered for the plaintiff for 155*l.* 9*s.* 11*d.*

*H. Eccles* moved for a new trial on the law and evidence and for misdirection. He cited Story on Pro. Notes, sec. 322; 4 M. & G. 446.

*Cameron, Sol. Gen.*, cited Story on Bills, pages 316, 318, 331.

ROBINSON, C. J.—We may judicially notice, and are bound I think to consider when we do know it, what the general course of the post-office is in regard to the delivery of letters. It is a matter of public notoriety; and the courts have always felt it right to entertain a knowledge of the ordinary course of public departments of the government,



so far at least that they are not necessarily to affect to be ignorant of what is in truth known not to themselves only but to every body else.

We know then, that in fact the post-office department of this city has for many years past received and continues to receive and take charge of all letters mailed in this city for persons resident therein; and that by the course of the post-office, the persons to whom they are addressed get them with the same certainty, and in the same ordinary course of delivery, as if they had come to the post-office from any place at a distance through the post.

This being notoriously so, I do not consider that the question of an indorser's liability can depend on what the post-office are *compelled* by law to do, but upon what *is in fact done*, not temporarily or at intervals, or in certain cases, but constantly, uniformly, and in all cases.

In *Scott v. Lifford*, 2 Campb. 249, it was objected that it had never been decided, that where the parties reside in the same town, the putting a letter into a receiving house of a penny or twopenny post was a proper mode of transmitting notice, but the court said that they did not see why, when the parties reside in London or the near neighbourhood, the party sending the notice should not be allowed to avail himself of the convenience of the twopenny post, but should be obliged to dispatch a special messenger.

*Smith v. Mullet*, 2 Campb. 208, and *Hilton v. Fairclough*, *ibid*, 633, affirm that ruling.—3 C. & P. 250.

In this case the notice was put into the office the same day that the intelligence of notice of dishonour arrived; this brought it to the same state of things as if notice had been mailed in England, addressed to the defendant as indorser, in which case he would have been in the same situation in regard to notice, as indorsers constantly are upon bills or notes, when the notice of non-payment has to be sent from any distant place in the province.

Being placed, as was sworn by the agent here, in the post-office on the same day on which notice was received, and that being a day earlier than it was necessary to be given, it had the same opportunity of reaching the indorser, as if mailed for him direct from England; for it is notorious that the same course as to delivery is in fact taken here with regard to letters arriving in the city by post, as with regard to those mailed in the city.

We have ascertained that there is in fact authority under the Post-Office Act, 5 Geo. 3, to establish twopenny post-offices in the colonies, and there is in effect, I think, one here, since whatever letters are mailed in the Toronto post-office are, as every body knows, received and delivered out to the inhabitants of the city with the same certainty as those coming from a distance.

MACAULAY, J.—If the postmaster is entitled to charge for letters received into the office here, addressed to persons living in the city of Toronto, it would follow that he is bound to deliver them in due course, in the same manner as letters coming by mail from other places.

No express evidence was given on this head, and in the absence thereof, I apprehend we must intend, that it was the duty of the postmaster to deliver letters so mailed in the usual course, and if so, it appears to me that it was open to the plaintiffs to serve notice through

the post-office, instead of sending a messenger to the defendant's residence. The latter is said to be the most advisable, but I do not find the former to be insufficient, and if the notice may be served in this way, its deposit in the post-office in due time seems all that is required of the plaintiffs, and it was apparently so deposited in due time.—7 East. 385; 9 E. 347, *Scott v. Lifford*; 2 Campb. 247. S. C.; 1 M. & S. 449.

JONES, J.—By the 5 Geo. III. ch. 25, sec. 11, the postmaster-general and his deputies are authorised to establish a penny post-office in any city or town.

This is re-enacted by 1 Vic. ch. 33, sec. 6.

The post-office in this town we know in fact to be a penny post-office, all letters deposited therein being delivered to the person addressed at the office for a penny.

I am therefore of opinion that any notice deposited in the post-office here, for any person residing in the city, is as good notice as if left at his place of residence or business.

A notice sent by the twopenny post, when the parties reside within the limits of such post, is good, let the distance be far or near, and we know that a letter deposited in the post-office here, is as certain of reaching the person to whom it is addressed in town, as if it had been sent from any other post-office, that is from Kingston or Montreal.

*Per Cur.*—Rule discharged.

#### MONFORTON V. MONFORTON AND BABY.

Where to an action of trespass for an assault, the defendant justified under a bailable writ, and the plaintiff replied that the arrest was ordered to be set aside, without stating *upon what grounds*, and without averring that the arrest so set aside *was the same arrest* under which the defendants justified: *Held, per Cur.*, on special demurrer, replication bad for both the causes assigned.

Trespass for an assault.

Plea.—Justification under a bailable *Ca. Re.*, issued at the suit of Monforton (defendant) by Baby his attorney.

Replication.—“That the said writ, under which the defendants have in and by their second plea attempted to justify the trespasses in the introductory part of that plea mentioned, and in the said declaration complained of by the plaintiff, was an alias writ of *capias ad respondendum*, which was, to wit, on the 14th day of February, A. D. 1846, irregularly sued and prosecuted out of the said court of our lady the Queen at Toronto, and that in Easter Term, in the 9th year of the reign of our sovereign lady Queen Victoria, to wit, on the 1st day of July, A. D. 1846, by a certain rule of the said court of our said lady the Queen at Toronto, in a cause wherein Archange Monforton, by the defendant Alexander Monforton her next friend, was plaintiff, and the now plaintiff was defendant, the same then being the cause in which the said writ was so sued and prosecuted as aforesaid, it was ordered that the arrest upon the said writ, and all subsequent proceedings, should be set aside with costs, and the bail bond if any given up to be cancelled, or that the defendant (the plaintiff in this cause) should be discharged from custody, as the case might be, as by the said rule of court now remain-

ing on the files of the said court will more fully appear, and this the plaintiff is ready to verify, &c."

Demurrer to Replication.—1st. Because the plaintiff argumentatively denies the issuing of the writ of *capias* under which the defendants justify, by stating that it was an *alias capias*; whereas if it was an *alias capias*, the plaintiff should have denied the issuing of the writ as pleaded.

2ndly. Because the arrest was alleged to have been set aside in Easter Term, in the ninth year of the reign of our lady the Queen, which was before the writ was issued, as stated in the said plea and replication, and was an inconsistent date.

3rdly. Because the writ was alleged to have issued in a different cause from the cause stated in the plea.

4thly. Because it was alleged that the writ was irregularly sued out and prosecuted, and the rule of court was not alleged to have set aside the said writ, but only the arrest on the said writ, without stating that the said arrest was the same arrest which the defendants justified in the second plea.

And 5thly. Because the said arrest only being set aside, the writ still afforded a good justification to the defendants.

The *Hon. J. H. Cameron, Sol. Gen.*, for the demurrer, referred to the several causes of demurrer mentioned above, and cited 4 Q. B. R. 852; 3 D. & L. 678.

The *Hon. S. B. Harrison, Q. C.*, contra, referred to 8 A. & E. 449.

ROBINSON, C. J.—The replication, I am of opinion, is defective in not shewing for what cause the arrest was set aside, as it might be for a cause which would not make the parties, but only the officer, liable in trespass; as for instance, if the sheriff had made the arrest after the writ was returnable—4 Q. B. R. 852; as the sheriff would not be liable, but the party and attorney, when an arrest is set aside by reason of defects in the affidavit.

It is also, I think, a fatal objection, that the replication does not aver that the arrest, which was thus set aside as illegal, was the same arrest under which the defendants have justified.

MACAULAY, J.—The replication appears to me to be bad for the causes specially assigned. It varies from the plea not only in the style of the writ, which of itself might be immaterial, but also in the style of the cause, rendering it an argumentative denial of the defendant's justification.

Neither is the ground stated on which the *arrest* was set aside. It may have been for some act on the sheriff's part for which the defendants would not be liable; or on some ground consistently with which the arrest might still be justified under the writ, which is not set aside. The cases cited of *Brown v. Jones*, 3 D. & L. 678; and 4 Q. B. 852; are in point on this head.

JONES, J., concurred.

*Per Cur.*—Judgment for defendant on demurrer.



## SANDERSON &amp; MURRAY v. THE KINGSTON MARINE RAILWAY COMPANY.

Where a wharf has been leased "with all the privileges thereto belonging," a vessel attached to the wharf by the usual fastenings cannot be distrained upon for rent.

Where the court has set aside a verdict for the defendant *in replevin*, upon the ground that he had no legal right of distress, and the jury have found a second time for the defendant : the court will almost always grant a second new trial to the plaintiff without costs.

This was an application for a new trial.

The pleadings are stated in 3 Cam. Reports, 168, a new trial having been granted in Easter Term last.

The value of the boats seized was admitted to be 500*l*.

The defendants objected, at the trial, that the evidence shewed the boats seized not to be the property of the plaintiffs, or at least did not shew them to be theirs ; and they contended, as on the former trial, that in the situation in which they were lying, that is in the water by the side of the wharf demised, and attached to it, they were liable to be distrained for the rent due in respect of the wharf and premises.

The learned judge told the jury that it had been determined by the court that the boats were not legally distrained, not being upon the premises demised ; but it appeared that some of the jury happened to have been upon the jury at the former trial, and they seemed unable to reconcile themselves to the view which this court had felt themselves compelled to take of the law of the case, and a verdict was a second time rendered for the defendants.

The defendants opposed the motion for a new trial :

1st. On the main ground formerly taken, that the distress was legal, the barges being liable to seizure where they lay, as being upon the premises demised.

2ndly. Because the plaintiffs did not shew such property in the barges, either general or special, as entitled them to sue for them in replevin ; and so the defendants should have had a verdict on the plea denying the plaintiffs' property.

3rdly. Because the verdict was in accordance with justice ; and being a second verdict on the same side, should not be set aside on a mere technical ground, if it is reconcilable with the real merits of the case.

*Campbell* of Kingston moved for a second new trial, on the law and evidence and the judge's charge ; he referred to Buller N. P. 53 ; Co. Litt. 45 ; 6 Bing. 150 ; 12 M. 339 ; 3 M. & P. 480-3.

*Burrowes* of Kingston shewed cause, and referred to 1 T. R. 701 ; 2 Stark C. ; *Kearslike v. White*, Co. Litt. 4 (b.) ; *Woodfall*, 57 ; also, 2 Str. 1142 ; 2 Wils. 63, 67 ; *Helliwell v. Eastwood*, U. C. R.

ROBINSON, C. J., delivered the judgment of the court.—With respect to the main ground of argument, we have already in this same case determined, that the barges not being *upon the premises demised*, though lying near to and attached to the wharf demised, were not liable to distress. Nothing came out on the last trial to vary the case, and we have not changed our opinion on the point of law.

The terms of lease were as stated on the motion which followed the first verdict, demising "the stone warehouse and the wharf on which it

"stands, and the frame warehouse and the wharf on which it stands, both situated at the foot of Gore-street, in the town of Kingston; together with a right of way twelve feet wide, from Gore-street to each of the above mentioned premises, as shewn in a plan annexed to the lease, and all the privileges thereto belonging."

The word "wharf" and the word "storehouse" have both a clear and well understood meaning; they mean something constructed, and certainly do not include any of the land covered with water, which is merely adjacent to the wharf on which the storehouse stands, and no part of which is covered by the wharf or storehouse. Then the words "*privileges thereto belonging*" it is clear will not bring the land itself, over or upon which any such privileges are to be exercised, within the premises demised, so that the rent can be said to issue out of it. All that is actually demised is the wharf and storehouses.

The case on which we rested our former judgment, *Buszard et al. v. Capel*, is too strong an authority, in my opinion, to be opposed, and it is not to be distinguished from the present on any fair ground, for though it varied from this case in the circumstance, that there the land owned, with the water in which the barges were lying, was not the property of the lessor, and so could not have been demised by him, whereas in the case before us, the defendants (the landlords) it appears did own and therefore could have demised the slip in which these barges were lying when distrained, yet that makes no difference if we are obliged to hold, that the demise does not in fact embrace the *locus in quo*, and it certainly does not unless *Buszard v. Capel* was determined contrary to law.

When the point first presented itself at *Nisi Prius*, 2 C. & P. 541, Lord Chief Justice Best took what I confess seems the view most satisfactory to common sense, and held that the barges ought to be considered as being upon the premises, being as much so as they could be in the nature of things, and two of the other judges of the Common Pleas concurring in the same view, his lordship's ruling was upheld in *Banc.*—4 Bing, 140.

The same point between the same parties however came afterwards before the King's Bench on a special verdict, and was very elaborately argued, 8 B. & C. 141; 2 Man. & Gra. 197; and the court of King's Bench, with a knowledge of the contrary decision in the Common Pleas, held clearly that the barges were not distrainable, as not being on the premises demised, though certainly they were as closely attached to the premises as the barges were in this case; and though the language of the lease in regard to easements, appurtenances, "privileges," &c., to be enjoyed and used with the wharf, was at least as comprehensive as that in the lease before us, and indeed more so.

Then here was the judgment of one court in England opposed to that of the other upon precisely the same point, arising upon the same facts, but we cannot be in doubt which judgment we are bound to follow, because error having been brought in the King's Bench, it was affirmed in the Exchequer Chamber, (6 Bing. 150, 12 Moore, 339; 3 M. & P. 480; 3 Y. & J. 344;) and that, we must take it, settles the question.

As to the second ground, that the plaintiffs did not prove property in the barges, sufficiently to entitle them to succeed in the issue, which denies that they were possessed, &c., as averred in the declaration; I

am of opinion that the evidence shewed that they had the legal property in the barges, either as their own, or in trust for persons to whom they were liable over as bailees.

We are reluctant to disturb this verdict, and perhaps should not do so, if we could be certain that there are not interests of third parties at stake, as the evidence indeed seems to establish.

The effect of a judgment for the defendants would be, that the barges would be re-delivered to them and sold, if not relieved by payment of the rent, which is large.

If we could be certain that the plaintiffs were wholly and solely interested in the barges, then we might not feel compelled to interpose, for they are bound to pay their rent, and by doing so could get back their barges; and we might not think it necessary to continue the litigation upon the mere point of *summum jus*, whether their property distrained could be said to be upon the premises devised or not.

But besides that the right decision of the question in this particular case may be of consequence to third parties, the point is one of those on which it is desirable that landlords and tenants should be made to see and abide by their respective legal rights, for the remedy by distress is one of *stricti juris*, and must be regularly pursued at the peril of the party distraining; and as the courts remarked in the case of *Buszard v. Capel*, it is important that the public generally should know in what situation the goods of strangers would or would not be liable to distress, as being on the premises.

Any latitude of construction, improperly afforded to a landlord in respect to the goods of his tenant, might be taken as a precedent to justify in another case a distress upon the goods of a stranger when found in a similar situation, and this might lead to inconvenience and embarrassment.

It is a further consideration in this case, that some of the jury who tried the case before were impannelled on the second trial, and when the learned judge explained to them, that this court had determined that the barges were not distrainable, not being on the premises demised, and that their verdict should therefore be for the plaintiffs, they stated that having on their oaths found the former verdict, they could not view the matter differently now, and they persisted in finding for the defendants. If we could otherwise properly have allowed the verdict to stand, it would not be satisfactory to do so under these circumstances.

*Per Cur.*—Rule absolute for new trial without costs.

---

#### McGILLIVRAY v. KEEFER.

Where A., the indorsee of a note, sued the payee B., and it was proved by C. (the maker,) that the note was made an item in the current account between A. and C. (the maker)—that it was long ago charged to the maker as a debt due by him, and that when it was so charged the balance was in his the maker's favour: *Held per Cur.*, that upon such evidence, the note must be taken to have been paid by the maker. *Held also*, that the note must be considered as paid by the maker, so soon as subsequent credits are admitted by A. sufficient to cover the note, though at the time of the note being charged the balance was not in C. (the maker's) favour.



The plaintiff declared on a promissory note, made by one Alexander Christie, 21st of October, 1844, payable to the defendant or order in three months for 52*l.*, and endorsed by defendant.

The defendant pleaded first, payment of the note by Christie, the maker, after the note became due, and before the commencement of the suit.

Secondly, agreement by the plaintiff to forbear and give time for payment to Christie, the maker, upon Christie's undertaking to do certain work for him.

Thirdly, no presentment to maker.

Fourthly, denying notice of non-payment.

The declaration contained another count on a promissory note made by the defendant, to which there was a special plea demurred to, and damages were assessed for the plaintiff contingent on the demurrer.

With respect to the first note, the defendant was sued as indorser; he proved by the evidence of Christie, the maker, that that note had been discounted by the Commercial Bank, that the plaintiff being obliged to pay it to the bank, had charged it in account against Christie, with whom he had at that time extensive transactions; that Christie paid the plaintiff 40*l.* on account of the note, which was credited to him; that in 1845, Christie did work for him to a large amount, after which an account was rendered in which the note was charged against him, and 40*l.* credited. Christie fell afterwards in arrears to plaintiff, in consequence of plaintiff's having to pay other notes which he had indorsed for his accommodation, but this was a year after the note had been charged against Christie, and as much as 500*l.* had been paid by the plaintiff to Christie, after he had taken up this note endorsed by the defendant. Christie also swore on the trial, that he considered this note had been merged in the account, and that if plaintiff had called on him within any reasonable time for payment of the note after it had become due, instead of merely charging it in account, it would have been paid; he swore also that he believed the balance of accounts was in his favour when the account was rendered to him in which this note was charged. Christie afterwards became a bankrupt and obtained a final discharge.

It was objected at the trial, that this evidence did not establish the defence of payment.

The learned judge recommended the jury to find for the defendant on the plea of payment, if they were satisfied of the truth of the evidence given by Christie, and reserved leave to plaintiff to move to enter a verdict for him of 13*l.* 12*s.* on the count upon the note in question, being the balance remaining unpaid and interest, if the court should be of opinion that the facts did not amount to proof of the first plea.

*H. Eccles* moved for leave to enter a verdict for that sum on the leave reserved, or for a new trial on the ground of misdirection, and for the reception of improper evidence.

*J. H. Hagarty* shewed cause.

ROBINSON, C. J.—I am of opinion that the direction was right, and that this rule should be discharged.

The case of *Bodenham v. Purchas*, 2 B. & Ald. 39, is an authority in point, under circumstances certainly not stronger than the present in favour of the defendant.

By the course of accounts rendered by the plaintiff to Christie, as proved at the trial, this note was made an item in the current account between them. It was charged long ago to Christie, the maker, as a debt due by him; and he swears that to the best of his knowledge, when it was so charged the balance of the account was in his (Christie's) favour. If that were so, then the note was paid; if otherwise, still it was paid as soon as subsequent credits were admitted sufficient to cover it; for the plaintiff does not shew that he kept it out of the account as a separate transaction, but the contrary appears.

It would be monstrous, after dealings to the amount of some hundreds of pounds, involving new credits to the maker of the note, and even large payments made to him, the indorsee could after all take this note out of the account and sue the payee, because the maker had long afterwards become insolvent, leaving him in debt by reason of subsequent advances.

MACAULAY, J.—The evidence supports the plea of payment. The note was brought into account and charged against the maker; and by the subsequent course of dealing and mode of entering the credits in his favour, it is evident upon the rules which govern the application of payments, that this note was satisfied by the maker as between him and the plaintiff, long before this suit was brought.—See the cases of *Maitland v. Secord* and *Wells v. Ritchie*, in this court.

JONES, J., concurred.

*Per Cur.*—Rule discharged.

#### PASSMORE v. HARRIS.

Where the due taking of evidence given abroad under a commission is sworn to by A., before B., who certifies at the foot of the affidavit that he is "Police Judge" of a certain town in the State of Kentucky—that A. is a person well known to him, and that he deposed before him to the truth of the matters stated above: and who signs the certificate with a scroll O in the place of a seal, adding that he has no corporate seal: *Held per Cur.*—upon an objection to the commission that it could not be read because the affidavit of due execution was not subscribed by the deponent, and because there was no proof of the authority of the person who administered the oath, and no seal attached to his name—that the commission was duly executed, and might be read.

This was an action of debt on bond, made 15th of June, 1829, and on the common counts.

The defendant pleaded, 1st, *Non est factum*.

2ndly, Payment.

3rdly, That the plaintiff and defendant were both residing in the State of Kentucky, where slavery was sanctioned by law, and that the defendant was a slave there at the time of making the bond, and incapable of contracting or owning property.

The same pleas were pleaded to the second count of the declaration, in which the writing was specially declared on, but not as a bond.

To the 3rd count (in which the same writing was declared on as a promissory note) the defendant pleaded—

1, That he delivered to the plaintiff certain goods, which he accepted in satisfaction.

2ndly, The Statute of Limitations.

3rdly, To 1st and 2nd counts, slavery of defendant, as rendering him incapable of contracting.

4thly, Payment; and to the other counts the defendant pleaded same defences.

The plaintiff took issue on the plea of payment, and replied to the defence of slavery, that the defendant was not a slave at the time of making the bond.

To the Statute of Limitations he replied, his continued absence from Canada: and he denied the delivery and acceptance of goods in satisfaction.

The plaintiff relied on evidence taken upon commission. The defendant objected that it could not be read, because the affidavit of due execution was not subscribed by the deponent. Also, that there was no proof of the authority of the person who administered the oath, and no seal attached to his name. The evidence was allowed to be read, subject to these exceptions.

The jury gave a verdict for the plaintiff, and 7*l.* 6*s.* 6*d.*

*D. B. Read* moved for a new trial, on the law and evidence and for the reception of improper evidence, and relied upon the following authorities.—2 Stark, C. 6; 1 C. & P. 578; Bull, N. P. 229; 1 Campb. 65; 6 M. & S. 39; 6 D. & R. 127; 1 Stark, Ev. 333; 1 B. & P. 360.

*P. M. Vankoughnet* shewed cause, and cited 3 Jurist, 146.

ROBINSON, C. J.—The evidence taken under the commission seemed clearly to establish a debt due by the defendant to the plaintiff, for money paid on defendant's account to one Frederick Harris; and I can see no ground for interposing, so far as merits are concerned.

The depositions are very carefully and regularly framed, and the due taking of the evidence is sworn to by one Samuel Daviss, before N. Maguire, police judge, who certifies at the foot of the affidavit, that he is "police judge" of the town of Harrodsburgh, in the State of Kentucky; and that Samuel Daviss being a person well known to him came before him on, &c., and deposed to the truth of the matters stated in the affidavits written above. N. McGuire signs this certificate with an O (scroll) in the place of a seal, adding that he has no corporate seal.

With regard to the objection of the affidavit of due taking not being subscribed by the party, the case cited of *In re Eady et al.*, 6 Dowl. 615, is by no means conclusive in support of it, because the court did not pronounce a decision in that case, they merely recommended to the party to have all done that he could to make the proceeding regular, because as it related to the passing of a fine, there might otherwise be an apparent flaw in the title.

The case is so far in support of this affidavit, that it did appear that in the foreign country there referred to (Hamburg,) the deponent is not allowed by law to sign his affidavit.

I cannot conceive that to be indispensable with reference to affidavits sworn abroad, and there is strong evidence on the face of the proceedings



before us, that this affidavit is taken according to the form usual in Kentucky. We cannot impose our form of proceeding on foreign countries.

Our stat., 2 Geo. IV., ch. 1, sec. 17 & 18, requires only that the examinations shall be returned "with an affidavit of the due taking thereof "annexed, sworn before and certified by the mayor or chief magistrate, &c."

We cannot hold this not to be an affidavit because it is not signed, nor can we say that it was not sworn or certified as the law requires, and that being so we cannot declare that "it has been made *appear to* "us that the evidence has not been duly taken," in which case alone our statute says the evidence is not to be read.

In Radbourne's case, 1 Leach C. C. 460, and in Fleming's case, 2 Leach C. C. 854, it was decided by the twelve judges, that depositions against a prisoner in a capital case were admissible in evidence, (where the law allows it,) although not signed by the deponent, but only by the magistrate who administered the oath; the judges observing that the statute of Ph. & M. did not appear to require a signature by the deponent, to render the deposition authentic. And so also it is with regard to the examination of a prisoner. As to there being no proof of the authority of the person to administer the oath, we may I think reasonably presume that the *police* judge of a small town in the state of Kentucky is the chief magistrate, in the absence of anything to the contrary, and as to exacting proof of his identity, or that there is really any such person or such an officer, that is out of the question; we must take that upon the inspection of the certificate, as we do in regard to foreign notaries, or the expense and difficulty of taking evidence on these commissions would be intolerable. The statute does not require that the chief magistrate shall use any seal in certifying.

With regard to the evidence and merits of the case, we find no ground for setting aside the verdict. The plaintiff proved his demand I think satisfactorily, and the defendant substantiated none of his pleas. It was clearly shewn that the debt was a just one, for money advanced to the defendant to enable him to procure his liberty; the defendant was free when he entered into the engagement, and seems to make not the best use of his liberty, in attempting to evade the payment of such a debt.

MACAULAY, J.—It is not a regular affidavit according to the practice of the court, but the signature of the deponent though required in practice, is not part of the affidavit itself; nor do I think that it is essential to render a party liable to indictment for perjury, if false. Its value is to facilitate the identity of the party.—2 Leach, 854.

On the evidence I have no reason to doubt but that the defendant was free at the time he incurred the obligation for which this action is brought.

JONES, J., concurred.

*Per Cur.*—Rule discharged.

#### BELLOWS V. CONDEE ET AL.

*Semble*, that where an interlocutory judgment has been signed, and the plaintiff is preparing for his assessment of damages in an outer district, a judge in chambers, upon an application made to him by the defendant, immediately before the holding of the assizes in the outer district, will not interfere to let the defendant in to plead; but will refer the parties to the judge of assize about to open the assizes for the outer district.

Trespass for cutting down and taking away timber of plaintiff's, growing on certain lands in the township of Westmeath.

2nd count, for cutting up and destroying a quantity of timber of plaintiff's, and preventing the plaintiff by force from taking it to market; laying special damage.

The defendants allowed judgment to go by default, and damages were assessed at 110*l*.

*G. Phillpotts* moved for the defendants to set aside the interlocutory judgment, and all proceedings thereon for irregularity with costs, on account of the interlocutory judgment not being properly entitled with the full proper names of the plaintiff, or why the judgment should not be set aside, and the defendants allowed to plead upon payment of costs, or with costs of the assessment to abide the event, or why the assessment should not be set aside as being contrary to law and evidence, and the damages excessive on affidavits filed.

On the 13th of January, 1845, one Wilson sold to the plaintiff all the white and red pine trees fit for making merchantable timber on certain lands in Westmeath, giving him by agreement three years to remove them.

It was clearly proved at the assizes, that the defendants had afterwards wilfully destroyed a large quantity of the timber so bought by the plaintiff. They made no defence, and damages were assessed at 110*l*. upon evidence that fully supported a verdict to that amount.

The defendants' attorney was served with declaration on the 16th of April last, and sent up the copy to his agent at Toronto, with instructions to file a special demurrer.

The agent wrote down recommending the defendants' attorney to plead their defence specially, as he saw no good ground of demurrer.

On the 27th of April judgment was signed, no plea having been put in.

The judgment paper contained an *incipitur* of declaration, the cause being properly entitled in the name of Caleb Strong Bellows, and below this was written the entry of interlocutory judgment, the cause being thence entitled Caleb S. Bellows.

On the 7th of May, the defendants moved in chambers to set aside the judgment for irregularity, or on affidavit of merits, the irregularity complained of being a variance in the name of the plaintiff in the entry of interlocutory judgment, and because the said judgment was not in the proper form.

The plaintiff's attorney filed affidavits, that before signing judgment he sent to the defendants' attorney to give notice that he would do so, unless a plea should be filed, as he feared being thrown over the assizes, and that after it was signed he made an offer to withdraw it and receive a plea.

The judge in chambers declined making the order to set aside the judgment as irregular; it was not pressed on that ground, but rather on the affidavit of merits, and the application being made just before the assizes were to open at Perth, the defendants' counsel was told that the application should be made to the judge in the district, as it might produce inconvenience to interfere at so late a stage by an order made at Toronto, opening the case and admitting a plea.

*A. Wilson* shewed cause.

ROBINSON, C. J.—I am of opinion that the defendants are not entitled to succeed on their rule, so far as it seeks to set aside the interlocutory judgment for irregularity.

The objection was not distinctly enough pointed out on the application in chambers. It was at any rate in my opinion not entitled to prevail; the motion was not by any means pressed in chambers as regarded the irregularity, and I considered that I had virtually decided against it, for it was only because I felt I could not properly give way to the objection, and could not interpose at all except on the footing of indulgence, that I referred the parties to the judge of assize in the district where the assizes were just about to open, for we have seen the inconvenience produced to plaintiffs in the country, when they are taken by surprise by indulgence granted here in opening the record to new defences, while they are preparing for a trial in a remote district immediately to come on as they suppose, and in ignorance that any application of the kind is intended.

Then upon the other ground in my opinion we ought not to interpose.

No specific defence is disclosed, the evidence given seems to leave room for none; the trespass proved was aggravated, and done in a mischievous spirit, and was very clearly proved.

If these defendants had any defence upon the merits, they waived it by determining, as they seem to have done from the first, to rest on their chance of throwing difficulties in the way of the other party.

The attorney for the defendants was on the spot, and could learn from his clients what meritorious defence, if any, they had. Instead of pleading any defence or denying the trespass, he writes up to his agent here to demur specially if he could. The agent it seems found no flaw that could be relied upon, and during the delay which the ineffectual attempt to embarrass the plaintiff occasioned, interlocutory judgment was signed.

I take the step adopted by the defendants' attorney to be a plain admission that they had no merits, or a declaration, if they had, that he chose to waive them; and I see no reason to doubt on perusing the affidavits, that the plaintiff's attorney would after all have consented to waive his judgment, and allow the defendant to plead any *bonâ fide* defence, if he had been personally applied to for that purpose.

JONES, J.—I think the defendant has waived the irregularity in the interlocutory judgment signed by the plaintiff, if any existed, by his proceeding before the Chief Justice in chambers.

As to the merits of the cause, the damages were assessed before me at the last assizes for the Bathurst District. There was satisfactory evidence of a most wanton destruction by the defendants acting together, or under the direction of the father to his sons, the other defendants, of the plaintiff's property, and to a sum equal or nearly so to the amount of damages found; but if it exceeded much the actual value, I do not think, in an aggravated case of trespass like this, the court can properly scan the evidence and set aside the verdict which a jury has given, unless the damages appear to be outrageous.

MACAULAY, J., concurred.

*Per Cur.*—Rule nisi discharged.



## BABY V. FOOTT, SHERIFF.

A Sheriff is bound by the return to a writ of *fi. fa.* against goods made in his name by a person, who though deputy sheriff at the time when he signed the sheriff's name to the return, was not deputy until after the writ was returnable.

Assumpsit for money had and received. Plea, général issue; verdict for the plaintiff, 63*l.* 16*s.* 9*d.*

The money was sued for as having been made by the defendant as sheriff on a *fi. fa.*, at the suit of the plaintiff. At the trial the plaintiff produced in evidence the writ with the return upon it, purporting to be signed by the sheriff, that he had levied the money. The present deputy sheriff, who was only appointed in September, 1846, swore that he had signed the return, though the return itself was in the handwriting of the former deputy sheriff, who was in office while the writ was current, which was in 1844.

It was objected that the sheriff was not bound by the return, made in his name by a person, who though as it appeared he was deputy sheriff when he signed the sheriff's name to the return, was not deputy till after the writ was returnable. The learned judge overruled the objection.

*S. B. Harrison, Q. C.*, moved for a new trial, for misdirection and for the admission of improper evidence, and cited 3 C. & P. 344.

*Cameron, Sol. Gen.*, shewed cause, and cited 5 B. & Al. 243; 7 T. R. 116; 9 B. & Ad. 541; 1 Campb. 389; 2 C. & M. 413; 9 A. & Ell. 455; 2 Cr. & J. 451; 4 E. R. 604.

ROBINSON, C. J., delivered the judgment of the court.

We are bound by the report of the learned judge, which is clear and expressly to the point, that all the defendant desired to prove was, that the deputy sheriff who made the return, was not deputy sheriff when the writ was current.

That however was of no moment; the sheriff was of course competent to return upon the writ, what he had done under it, and without reference to who might have been his deputy while the writ was current, for all that was done or omitted upon that writ, is to be taken as done or omitted by the sheriff. Then after the writ had ceased to be current, a new person comes in as deputy, but he is equally competent to make a return in the sheriff's name, in regard to what happened before his being deputy, as after, for he represents the sheriff at the time of the return, which is the only question; he could sell upon a *fi. fa.* goods that had been seized under a writ which had expired before he came into office, and for all ministerial purposes connected with the office, he represents the sheriff so as to bind him by official acts done while he is deputy.

It is laid down in general terms in the books, "that the sheriff in making an under-sheriff does impliedly give him power to execute the ordinary and ministerial offices of the sheriff himself, as serving of processes and executions, *making returns* and the like;" and without any such limitation as that the return can be only of something done in the time of the particular under sheriff.

I see no ground for supporting such restriction, for the return is clearly a ministerial act, which the sheriff may do by deputy.

It is not alleged that the evidence offered could have shewn anything

more, than that the under sheriff who made the return was not himself in office while the writ was current, and that we think was a point not material one way or the other.

*Per Cur.*—Rule discharged.

#### WALTENBERGER V. McLEAN ET AL.

The court will not interfere summarily to set aside a plea on the ground of fraud, except in manifestly clear cases.

Rule nisi to set aside a plea of release in an action of debt on bond, made by the defendants to the plaintiff, and assigned in January, 1847, to one Hearn, upon affidavits of Hearn that the defendants had fraudulently procured the plaintiff to give the release after the assignment and with knowledge of it.

Affidavits were filed on the other side, repelling the charge of fraud, and tending to shew that the assignment was not a *bonâ fide* transfer of the bond for the purpose of giving Hearn an interest in it.

ROBINSON, C. J., delivered the judgment of the court.—I am of opinion that we cannot with propriety interfere summarily to set aside this plea of release; the very nature of the writ and assignment under which Hearn claims the interest in the bond, is such as to create suspicion, and the affidavits are so completely opposed to each other, and leave the case on such unsatisfactory ground, both as to the nature of the alleged assignment, and the circumstances under which the release was given, that we could not venture to exercise a jurisdiction upon such grounds, which is never exercised but in clear cases.

In Phillips v. Claget, 11 M. & W. 84, the court say, unless the case can be made out manifestly and clearly the court ought not to interfere. Here I think there seems as much reason to doubt the *bona fides* of the assignment as the release.

I think the learned judge, to whom this application was first made, exercised a sound discretion in refusing to set aside the plea; I am convinced such a plea was never set aside under such circumstances.

*Per Cur.*—Rule discharged.

#### CORNER V. McKINNON.

Where the plaintiff and defendant have had open accounts for a long period, and have taken no pains to come to an understanding in regard to the terms of their dealing, or to preserve the means of proving the necessary facts, and the jury find, more or less upon conjecture, what the court may think excessive damages for the plaintiff, the court will very rarely indeed on that ground assist the defendant by granting a new trial.

The court will not disturb a verdict upon an objection taken upon the argument of a rule nisi, which had not been disclosed in moving the rule.

Assumpsit on the common counts.

Pleas—general issue; payment and set off.

Verdict for the plaintiff, 153*l.* 16*s.* 6*½d.*

This case had been tried once before, when a verdict was given for the plaintiff for 112*l.* 13*s.*, and the court, not without some hesitation,

granted a new trial, the damages seeming rather excessive, and it appearing that the plaintiff had, in an account rendered by him to the defendant, made no charge in respect to several items for which he was in this action seeking to recover. The court would not however have interfered with the verdict, the case having been left fairly to the jury, and there being some evidence in support of the charges advanced, if it had not been that the defendant represented himself to have suffered disadvantage from his inability to procure a witness.

*Cameron, Sol. Gen.*, moved for a new trial, on the law and evidence.

*Sullivan, Q. C.*, shewed cause.

ROBINSON, C. J., delivered the judgment of the court.—We none of us, I think, are prepared to concur fully with the verdict of the jury, but in matters of this description, where the parties have had open accounts for a long period, taking no pains to have a precise understanding in regard to the terms of their dealing, or to preserve the means of proving the necessary facts, it is not to be expected that a verdict, which must under such circumstances be founded more or less upon conjecture, will bear a strict comparison with the evidence.

We must allow some weight to the knowledge which a jury of the district may be supposed to have of the parties and their witnesses, and their knowledge also of what is usual and reasonable, in the kind of business which the plaintiff and defendant were engaged in.

It often happens, no doubt, that the view which a jury with these advantages takes of a subject in controversy, does more real justice than the result which a stricter adherence to evidence would seem to conduct us to.

It is to be regretted if our willingness to afford the defendant, at his own request, another opportunity of going before a jury, has in the end been injurious to him; but that is a risk which in cases of this kind a party applying for a new trial must make up his mind to incur. It was urged by the defendant, that the evidence shewed upon the face of it a plain miscalculation by the jury, resulting in an error of about 50% against him: it became clear, however, on examination, that the supposed error had not been committed. Then on the return of the rule nisi, the defendant pointed out another source of error, which he considered to be manifest, in the plaintiff's calculation of the quantity of sawed lumber. If this had been so, it would have been difficult to have made it the ground of disturbing the verdict, when nothing of that objection had been disclosed on moving the rule, nor until after the plaintiff had shewn cause against it.

It turns out, however, that this last alleged error is an imaginary one, as has been explained by the learned judge who tried the cause; that ground therefore fails, and we are left to the evidence and the affidavits filed. They certainly lead us to apprehend that the jury have been too liberal in their allowances to the plaintiff, but we do not think that we should be acting in accordance with the principle on which new trials are granted, if we were to interfere a second time upon the grounds laid before us.

*Per Cur.*—Rule discharged.



## MALLOCH V. JOHNSTON.

A certificate for costs, either under the Division Court Act or under the District Court Act, must be moved for *immediately after* the trial, and if not moved for then, or moved for and refused, no discretion remains with the court or with the judge who tried the cause, to grant a certificate for costs *afterwards*. *Semble*, that if a plaintiff thinks he is entitled upon the record to Queen's Bench costs without the aid of a certificate, his course is, to tax his costs in the first place, and if the master will not allow him full costs, then to apply for a revision of taxation.

The plaintiff sued in person as an attorney in assumpsit, commencing his declaration in the usual form: "John G. Malloch, gentleman, one, &c., in his own proper person, complains," &c.—stating the cause of action to be for services rendered by him for defendant, as an attorney and solicitor.

The defendant pleaded the general issue.

The particulars of demand attached to the record were one bill of costs, 6*l.* 5*s.* 2*d.*, for which and no other demand the plaintiff recovered a verdict at the trial.

The plaintiff made affidavit that when he brought this suit he was and still is judge of the District and Division Courts of the District of Bathurst; that the defendant then resided and still resides in the District of Dalhousie; that the cause of action arose in the District of Bathurst, and that the plaintiff's witnesses all resided there; that the district courts sit on the same days, and he could not have left his own district to attend the trial at Bytown, if he had brought the action in the District Court there.

On this affidavit, *A. Wilson* moved to give a direction to the learned judge who tried the cause, to grant a certificate for Queen's Bench costs.

ROBINSON, C. J., delivered the judgment of the court.

We can give no such direction as is desired. A certificate, either under the Division Court Act, within whose jurisdiction the amount of the debt here recovered is, or under the District Court Act, must be moved for immediately after the trial, and if not moved for then, or moved for and refused, then no discretion remains with this court, or with the judge who tried the cause, to grant a certificate for costs afterwards.

The only question there can be is, whether, upon the record, the plaintiff is entitled to Queen's Bench costs of right, and without the aid of a certificate.

If he thinks so in this or in any other case, his course is to tax his costs in the first place; and if the master will not allow full costs, he must then apply for a revision of taxation.

*Per Cur.*—Rule discharged.

## POLLOCK ET AL. V. FRASER, SHERIFF OF THE DALHOUSIE DISTRICT.

Where in an action of trespass against a sheriff for seizing and taking away goods, the plaintiff proves that the defendant took the goods out of *his actual possession*, the defendant cannot give evidence of his legal authority to seize them under a *fi. fa.*, without pleading it.

An assignment of goods made by a debtor after a writ of *fi. fa.* has been returned *nulla bona*, and after it has *passed the return day*, is valid.

The plaintiffs sued the defendant in trespass for seizing and taking away timber, &c.

The defendant pleaded not guilty, and that the goods were not the goods of the plaintiffs.

Verdict for the plaintiffs on both issues, 192*l*.

It was proved at the trial that one William Morrow had brought a raft of timber down the Ottawa River to Bytown, in July, 1846, and there delivered it to the plaintiffs, who had made him advances on account of it, and who thereupon paid the wages due to the men who brought it down.

The timber was delivered over to the plaintiffs' agent, to be held in security for such advances. In September following the defendant seized and sold the timber, though forbidden by the plaintiffs' agent, alleging that he had an execution against Richard Morrow, and that the timber was his.

The defence was, that William and Richard Morrow were partners, having entered into partnership in the lumber business in November, 1845, by written agreement, which stated that the expenses were to be borne equally, and all profits equally divided, after the timber should be sold at Quebec; that the timber should be marked in William Morrow's name, and the said William Morrow was to have and to hold the same until it was sold; and a regular account of what was wanted for carrying on the business was to be kept by William Morrow.

It was proved that on the 19th of June, 1846, Egan & Co. obtained a judgment against Richard Morrow for 167*l*. 14*s*. 3*d*.; that a *fi. fa.* issued thereon, and was delivered to the sheriff on the 27th June, 1846; to which the sheriff returned *nulla bona*: whereupon an *alias* issued on the 1st of August, 1846, returnable the first day of Michaelmas Term, upon which the defendant seized the timber in question.

Richard Morrow was called: he proved that the timber seized was property belonging to himself and his brother William, as partners. The sheriff sold the interest of Richard in the timber.

It was objected on the part of the plaintiffs, that the sheriff could not defend himself upon the judgment and *fi. fa.* under the pleadings; and that if he could, yet the evidence did not shew the goods to be the goods of Richard, which was the issue, but the goods of him and another; that the sheriff's return of *nulla bona* to the first writ was conclusive to shew that the property was not held under the first writ, and before the *alias* issued it had been assigned by one of the partners (William) to these plaintiffs; and that by the terms of the copartnership William was to have the control of the property till sold at Quebec, and therefore it could not in the meantime be seized as the property of Richard.

The learned judge was inclined to the opinion that the plaintiffs should recover, and a verdict was rendered for them, with leave to the defendant to move to enter a verdict for him if the court should be of opinion that Richard had a legal interest in the timber at the time of the seizure under the *alias fi. fa.*, which could be sold under that writ, notwithstanding the return of *nulla bona* to the first *fi. fa.*, and the intermediate assignment to these plaintiffs.

J. H. Hagarty moved to enter a verdict pursuant to such leave, and

cited 6 M. & S. 4; Bank B. N. A. v. Jarvis, 1 U. C. R. 182; Arch. Pr. 432; Sewell on Sheriffs.

*S. Richards* shewed cause, and cited 8 A. & E. 121; Keesar v. McMartin, 3 U. C. R. 29; 5 Scott's N. R. 908; 12 M & W. 674; 2 Tidd's Pr. 100; Sewell on Sheriffs, 249.

ROBINSON, C. J.—I am of opinion, that the defendant having taken the goods out of the actual possession of the plaintiffs, or, which is the same thing, of their agent, could not give evidence of his legal authority to seize them under the *fi. fa.* without pleading it; and therefore the verdict on that ground alone is proper. But I do not think the plaintiffs' recovery could have been defeated if the defendant had pleaded specially.

Independently of any question upon the effect of the terms on which the two Morrows stood under written articles between them, as regards the property in the timber, that is, whether it would make it joint property or not, it is clear, if the brothers were partners, either had a disposing power over the partnership property; and the evidence shews this to have been disposed of, or at least assigned in security for a reasonable purpose, growing out of the business to be carried on, and without any ground for surmising any intended fraud as regards Richard Morrow or any third party. What makes it stronger too is, that the one who did transfer it is the one who by express agreement was to have the particular direction and control of the timber while it remained unsold.

It was contended that he was incapable of making a transfer, because there *had* been a *fi. fa.* against the goods of *Richard Morrow*, though the sheriff had made no seizure under that writ, but had made a return to it of *nulla bona*, and though its return was passed before the assignment to the plaintiffs was made.

It is not necessary to discuss that point; for I have no doubt that after the *fi. fa.* against a debtor's goods has been returned and is no longer current, it cannot have the effect of invalidating a sale made by the debtor; for certainly the goods are not under such circumstances in the custody of the law, and are not bound by a writ which has lost its force.

MACAULAY, J., and JONES, J., concurred.

Rule discharged.

---

#### MARSH v. BOULTON.

Where it appears in the course of the plaintiff's evidence at the trial, that the defendant, sued in trespass, was acting *bona fide* as a justice of the peace; and the jury, upon that fact having been left to them by the judge, so find it—the plaintiff must prove that he had given the defendant a month's notice of action—and this proof is necessary though the defendant has pleaded the general issue simply, without adding “by statute” in the margin.

Cattle supposed to have been stolen are taken by A., a constable, to B., an innkeeper, to feed and take care of. After some time B. wishing to be paid for his keep of the cattle, applies to C., a magistrate, who had nothing to do with the original caption, for directions—C. tells him to sell the cattle and so satisfy his claims—this B. does—D., the owner of the cattle, sues C., the magistrate, *in trespass*. *Held, per Cur.*, that as against the magistrate trover and not trespass should have been the form of action.

*Semble*, that under these circumstances, B., the innkeeper, would not be liable to the owner of the cattle *in trespass*.



Trespass for taking certain cattle of the plaintiff's, and converting them to the defendant's use.

The defendant pleaded the general issue in the common form, not "by statute."

It appeared on the evidence given at the trial, that the plaintiff, in the spring of 1846, had three oxen, with which he was employed near the City of Toronto in drawing timber. During a cessation of the work they were turned upon the common; and after several weeks, being required, they were looked for and could not be found. A constable seeing them in the streets of the city, under circumstances which led him to apprehend they had been stolen, took them in charge and drove them to an innkeeper's in the city, and directed him to advertise them and keep them until an owner should be found. Written notices were put up, and they were advertised in several newspapers; and no one coming to claim them, the innkeeper applied to the defendant, as chief magistrate of the city, requesting his advice as to what course he should take with them, telling him all the circumstances. The defendant advised with another city magistrate about it, and told the man that he must endeavour to find the owner. After some weeks more, the innkeeper went again to the defendant, and begged his direction how to act; when the defendant told a city constable who was present to go with the man, and get an auctioneer and sell them. This was done. The oxen were sold openly in the market-place to pay for their keep—they were very poor, and did not sell for quite as much as the charges upon them.

The cattle were described in the advertisements as being taken up by the "City authorities." The constable paid over the proceeds of the sale to the City Chamberlain; by whom the money was paid to the innkeeper, deducting the charge of the auctioneer.

The other magistrate with whom the defendant consulted was called on the trial; and he stated that he advised the defendant to tell Garfield (the innkeeper) that he had the remedy in his own hands; that he should advertise the cattle properly, and if not claimed, he should sell them for their keep. Some days after the sale, the plaintiff, having seen or heard of the advertisement, went to the innkeeper and inquired for the cattle; and, learning the facts, he brought his action against this defendant (the mayor), as having directed the conversion of the cattle, and therefore liable to him in trespass.

On the part of the defendant it was objected—

1st. That notice of action should have been given.

2dly. That if any public authority was liable, it was the corporation and not the defendant who was acting in their behalf.

3rdly. That the defendant gave advice only and no direction.

4thly. That as the defendant was not the person who took the cattle in the first place, he could not be liable in trespass to this plaintiff for taking them out of the possession of a third person, and with the consent of that person, and could not be answerable in trespass as if he had taken them from the owner, unless the sale or the taking by the innkeeper had been shewn to have been for the defendant's benefit.

The learned judge directed the jury to find the value of the three oxen, and also to find whether the defendant, in any thing done by him in the matter, intended to act in the discharge of his duty as a magis-

trate of the city, or acted only under colour and pretence of such authority, and not *bonâ fide*.

The jury found the value of the oxen to be 18*l.*, and that the defendant acted in the capacity of chief magistrate; and the verdict was rendered for the plaintiff, 18*l.* damages, subject to the opinion of the court on the objections moved.

*J. Lukin Robinson* moved for leave to enter a verdict for the defendant, on the objections urged at the trial, and cited in their support—9 B. & C. 809; 9 E. R. 364; 1 B. & C. 12; 6 B. & C. 354; 6 A. & E. 663; 3 Wils. 377; 4 B. & Ad. 619; Roscoe on Ev. 480, 594.

*A. Wilson* shewed cause, and cited 3 M. & G. 125; 9 Dowl. P. C. 896; 5 Jurist, 552; 16 E. R. 7.

ROBINSON, C. J., gave no judgment.

MACAULAY, J., delivered the judgment of the court.

Two objections are made against the verdict—first, that the defendant was entitled to notice of action, which was not proved to have been given; and secondly, that trespass does not lie against him under the facts in evidence.

As to the first point, the jury expressed their opinion that the defendant, in what he did, acted *bonâ fide* in his official capacity of mayor; but it is contended by the plaintiff's counsel, that the want of notice cannot be urged under the general issue not pleaded per statute, and per statute was not added in the margin of the plea in this case. The case of *Bartholomew v. Carter*, 3 M. & G. 125, 9 Dowl. P. C. 896, to a certain extent supports this argument; but in *Tyrwhitt's Pleadings*, page 160, after mentioning this case, a note is added, that if at the end of the plaintiff's case it appears the defendant was entitled to notice of action, &c., the omission is not aided by the defendant's omission of "by statute" in the margin of the plea; and the terms of the statute 24 Geo. II. ch. 44, under which I understand the claim to notice is made, seems to warrant this view in cases coming within its provisions. The first section enacts, that no writ shall be sued out until notice of such writ shall have been delivered one month, &c., in which notice shall be contained the cause of action which the party hath; and by section three it is enacted, that the plaintiff shall not recover any verdict against the justice, in any case where the action shall be grounded on any act of the defendant as justice of the peace, unless it is proved upon the trial of such action that such notice was given as aforesaid; but in default thereof, such justice shall recover a verdict and costs, &c.

Now here it appeared in the course of the plaintiff's evidence, that the defendant acted as mayor, or, in other words, as a justice in the premises; and the third section of the act expressly prohibits the plaintiff's recovering without its being proved on the trial that notice of action was given.

Under such circumstances, it appears to me that it was open to the defendant to rely upon the objection under the plea as pleaded, and the statute aforesaid.

Then, as to the second question, I apprehend trover, and not trespass, would be the proper remedy.

The defendant had nothing to do with the original caption; and the substance of his subsequent interference is, that after the cattle had

been some time in the charge of the innkeeper, and a claim had accrued to him for their keeping, he, on being applied to for directions as chief magistrate of the city, directed them to be sold in order to satisfy such claim. He had no personal interest in either the original taking or the subsequent sale. And although, where the original taking is a trespass, it may be said that every new wrongful act is a trespass also, still, considering the way in which the original taking occurred and the defendant afterwards interfered, it appears to me he merely sanctioned a conversion of the property by the innkeeper to satisfy his demand for keeping, &c.; and however this might have enabled the plaintiff to recover against him in trover, he is not answerable in trespass.

The case of *Hartley v. Moxham*, 3 Q. B. 701, shews that it is not every wrongful act towards the personal property of another, that constitutes a trespass, although such property be in the actual possession of the owner, and the wrongful act in effect deprives him of the controul over it. It is not always easy to draw a satisfactory line between what shall amount to a trespass to the goods of another, and what shall not. But if the innkeeper was not liable in trespass for receiving or selling the cattle—and I do not think he was if he acted *bonâ fide*, even though responsible in trover—I do not see that the defendant can be made so liable for having authorised or directed the innkeeper to sell, as what he supposed to be the proper course to reimburse himself for the keep. I would also refer to *Wilson v. Barker*, 4 B. & Ad. 614; *Bro. Trespass* Pl. 48; 2 Roll. Ab. 556, Pl. 50; Sid. 438; *Bac. Ab. Actions, B.*; *Vin. Ab. Inns and Innkeepers, B.*, and *Actions, G. 4*; 3 Star. N. P. C. 172, *Johnson v. Hill*; Yel. 67 and note; 5 M. & S. 185, *Chase v. Westmore*; 1 Stra. 557, *Jones v. Pearl*; *Cross on Lien*, 345; *Jones on Bailments*, 95, note.

Treating the defendant as not entitled to notice, and as a mere wrongdoer, it amounts to no more than this—that a constable having taken possession of cattle suspecting them to be stolen, placed them in charge of the innkeeper to feed and take care of them till otherwise disposed of; that no owner appearing, and the innkeeper having a claim and lien upon them for their keep, the defendant, a stranger, being applied to or consulted on the subject, advised or told the constable or innkeeper to sell them. Considering the way in which they came into the innkeeper's possession, I do not think he was liable to an action of trespass, and if not, neither do I think the defendant, a stranger, can be made responsible as a trespasser by reason of the act of sale. It appears to me therefore that the verdict should be set aside and a nonsuit entered.

*Per Cur.*—Postea to the defendant.

---

#### ROSS ET AL. V. BURTON.

The plaintiffs sued the defendant on the following guarantee:

Port Hope, Nov. 14th, 1845.

"I hereby hold myself accountable to you for any goods Mr. Francis Murphy may purchase of you, to the amount of 250*l.* currency."

(Signed) J. K. BURTON.

It was proved at the trial, that the plaintiffs had sold goods to Murphy on the 19th Nov., 1845, amounting in all to 311*l.*, and that after the original credit of six months on the 311*l.* (understood between the parties at the time of sale,



as the jury found) had expired, the plaintiff had extended the time by taking notes without the privity of the defendant. It was also proved that on the 2nd April, 1846, other goods were sold to Murphy to the amount of 83*l.*, for which Murphy at the time gave his bill at three months.

The defendant pleaded (as will be seen in the statement of the case,) a defence which covered only the first sale of 311*l.*, to which the plaintiffs, by their replication simply denying the truth of his defence, admitted his claim to be limited.—*Held, per Cur.*—1st that the guarantee was a continuing guarantee. 2ndly, that the plaintiffs having extended the time of credit as to the 311*l.*, had thereby discharged the defendant from any liability on that sum. 3rdly, that though the sum of 86*l.* might have been recovered under the continuing guarantee, yet that from the state of the pleadings, *without a new assignment* the plaintiffs could not recover it in this action.

The plaintiffs sued in assumpsit on the following guarantee :

“ Port Hope, November 14, 1845.

“ Gentlemen,—I hereby hold myself accountable to you for any goods  
“ Mr. Francis Murphy may purchase of you, to the amount of 250*l.*  
“ currency.

(Signed) “ J. K. BURTON.”

And they averred, that on the 14th of November, 1845, they sold Murphy goods to a large amount, viz. 500*l.*, on a credit which has long since expired, but that Murphy had never paid the 500*l.* or any part thereof, of all which the defendant had due notice; and that he did not pay the 250*l.* according to his undertaking.

The defendant pleaded, 1st, non assumpsit.

2ndly, that the plaintiffs sold the goods to Murphy on a credit of six months, and after that credit expired gave him time to pay by instalments, and took three promissory notes from him in pursuance of their agreement, at two, three and six months after date, without the defendant's consent, and that Murphy then delivered the three notes to the plaintiffs, and the plaintiffs received the same “in pursuance of and “ according to the said agreement for and on account of the price of the “ said goods so sold and delivered as aforesaid.”

The plaintiffs replied to this plea *de injuriâ*.

Upon the trial it was proved, that on the 19th of November, 1845, the plaintiffs sold to Murphy, goods amounting in all to 311*l.* 11*s.* 6*d.*

On the 24th July, 1846, the goods being over-due, the plaintiffs rendered Murphy an account, and took his promissory notes as pleaded, thereby extending his credit while the notes were running. This was without the privity of the defendant.

There was no evidence of any precise agreement between the plaintiffs and Murphy as to the credit to be allowed at first, but it was proved by the plaintiffs' witness, that their course of business was to give six months' credit, and from that time to charge interest, but renewing their credit from time to time for twelve, fifteen or eighteen months, to suit the convenience of customers.

The plaintiffs desired to give evidence by another witness as to the usual course of their business in that respect, being different from what the other witnesses had proved, but he was rejected, there being no evidence that either Murphy or the defendant had had any previous transactions in business with the plaintiffs, or knew what their general course of business had been.

It was proved that the plaintiffs had made another sale of goods to

Murphy on the 2nd of April, 1846, to the amount of 83*l.*, for which Murphy gave his bill at three months.

The learned judge ruled, that the defendant was discharged from his liability in respect to the goods first sold, by the taking of the notes, if the jury should find that the original credit had expired when the notes were taken; but for the goods sold in April, 1846, he considered the defendant was liable, looking upon the guarantee as a continuing guarantee; and that the plaintiffs might have recovered for them, if they had replied to the defendant's second plea in such a manner as to admit evidence of the further sale.

The jury found for the defendant.

*Skeffington Connor* moved for a new trial, on the grounds of the improper rejection of evidence, and on the law and evidence, and for misdirection; and upon the points raised, cited 3 Campb. 220; 2 Campb. 436; 2 Campb. 413; 6 Q. B. R. 917; 6 Bing. 244; 2 Tyr. 86; 4 Tyr. 558; 2 Dowl. N. S. 758.

The Hon. *R. B. Sullivan, Q. C.*, shewed cause and referred to the following authorities.—12 E. R. 277; 2 Campb. 413; 6 Bing. 244; 3 M. & P. 634; 6 M. & W. 605; 1 M. & S. 241; 8 Bing. 156; 3 Merivale, 272; 4 Tyr. 548; 5 Bing. N. C. 553; 9 A. & E. 248; 4 A. & E. N. S. 213; 1 A. & E. N. S. 77; 3 D. & L. 364.

ROBINSON, C. J.—I have no doubt that the guarantee given by the defendant is a continuing guarantee, and binds the defendant to pay to that extent for any goods purchased till notice given that the defendant would not continue to be liable for new purchases.

The cases relied on by the plaintiffs' counsel clearly establish that, though the distinction between some of them and *Melville v. Hayden*, 3 B. & Al. 593, is not very evident. I should have felt it to be more reasonable, in the absence of authority, to hold this guarantee to extend only to the first purchase of goods made to the amount of 250*l.*, but the law seems to be clearly otherwise. Still that question only involves the sum claimed under the subsequent sale in April, which the plaintiff could clearly not recover without new assigning, because the defence pleaded clearly covered the single transaction to which the plaintiffs by their replication admit his claim to be limited, for they support their declaration against the plea, not by shewing that there were other goods sold to which that defence would not apply, but by denying the truth of the defence.

Then as to the goods first purchased, the defendant established his defence to the satisfaction of the jury, and I think the evidence did establish it. The account rendered corroborated the evidence of the witness first called, that the goods were sold on an understood credit of six months, at the expiration of which time payment might have been demanded, and it was in fact demanded after the six months expired, though not immediately, and notes giving time were taken. The plea certainly was proved, and the defendant was therefore entitled to succeed on that issue.

MACAULAY, J.—It was clearly a continuing guarantee, but the plaintiffs should have new assigned. The cases in 1 Q. B. 77, and 4 Q. B. 213, shew this.

When the declaration is general, and the plea is general, as license,

payment, &c., a new assignment is said not to be necessary ; but where the plea narrows the declaration, as in this case, it is otherwise. Here the plea does narrow the general effect of the declaration, and limits it to the goods (if any) as to which the plaintiffs gave an unauthorised extension of credit. I do not see that the evidence rejected was improperly refused—on the contrary, the usual mode of the plaintiffs' dealing would not affect the defendant's liability, unless it formed a part of the original contract. An habitual liberality, resting solely on the plaintiffs' discretion, would not entitle the defendant's *principal* as of right by contract to such prolonged credit, and therefore when given the defendant's sanction should have been obtained.

JONES, J., concurred.

*Per Cur.*—Rule discharged.

### DOE DEM. LYON V. LEGÈ.

A purchaser at sheriff's sale, as the plaintiff in an action of ejectment against a defendant who is in possession, not as claiming any interest under a title independent of the debtor, or under any title, but as a mere servant of the debtor, is not held to stricter proof of title against the servant in possession, than he would be against the debtor himself.

*Semble*, that lands may be sold under a judgment confessed by an executor. That lands can be sold upon a judgment execution against the personal representatives of the testator, under the British statute 5 Geo. 2, ch. 7, is a point not now open to discussion before the court.

Ejectment for Lot 9, in the first concession of Gloucester.

The plaintiff produced in evidence a judgment entered on the 6th of Jan., 1845—Cormack v. McGillivray, executor of Forbes, on confession, to be levied *de bonis testatoris*, with award of costs, to be levied *de bonis propriis*, award entered on the roll of *fi. fa.* against goods, corresponding with the judgment to the sheriff of the Home District, to which *nulla bona* was returned; and then a writ of *fi. fa.* against lands of testator, directed to the sheriff of the District of Dalhousie. The sale by the sheriff, under this writ, to the lessor of the plaintiff, was admitted. On the part of the defendant it was proved, that Forbes died in 1842 in possession of this land; and that the defendant, according to his own admission, having been a servant of the testator, was left on the farm by his widow to take care of it. At another time he asserted he was in possession under a third party, who claimed title.

It was objected by the defendant, 1st, that there was no evidence of Forbes's title.

2ndly, That lands cannot legally be sold under a judgment against the executor.

3rdly, That at any rate, they could not be charged through a judgment confessed by the executor.

4thly, No proof that McGillivray really was the executor of Forbes.

5thly, That the defendant was to be looked upon as tenant to Forbes, and he attorned to the third person mentioned (one Basterre), before the sale; and so a stranger to Forbes's title being in possession, claiming title, it was necessary for the plaintiff to shew Forbes's title strictly.

The learned judge overruled these objections, and no defence was gone into, and the jury found for the plaintiff.



*Adam Wilson* shewed cause against a rule moved for on the grounds above stated, for a new trial on the law and evidence, and for misdirection; he referred to 4 B. & Ad. 87; 4 Q. B. R. 762.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the plaintiff is entitled to judgment upon this verdict.

The evidence shewed the defendant to be in possession, not as claiming any interest under a title independent of Mr. Forbes, or under any title, but by his own admission as a mere servant of Mr. Forbes, and of his widow after his death.

Upon such evidence, the purchaser at sheriff's sale is not held to stricter proof of title against him than he would be against the debtor himself, if he were living and in possession.

The other objections have not been insisted upon; and we are not prepared to hold, that lands cannot regularly be sold under a judgment confessed by an executor.

We are not to presume the judgment fraudulently confessed, and cannot determine that the executor must in all cases, whether the claim be just or unjust, put the estate to the charge of fruitless litigation by denying it.

That lands can be sold upon a judgment and execution against the personal representatives of the testator, under 5 Geo. II. chap. 7, is a point not now open to discussion before us.

If there be danger, as no doubt there may be, that the real property of the heir may be sometimes dishonestly converted, under judgments collusively or improvidently confessed by the executor or administrator, that may be guarded against by such legislative measures as have been adopted in many colonies, or more properly by modifications introduced in the Imperial Parliament for preventing the interests of the heir from being injured by the operation of the British statute 5 Geo. II. ch. 7.

*Per Cur.*—Rule discharged.

#### BALDWIN QUI TAM V. HENDERSON.

Where the plaintiff has a general verdict upon a record containing several counts, and the defendant moves to arrest the judgment on the ground that some of the counts are defective, and the plaintiff asks leave on the return of the rule to amend his verdict, by confining it to a good count: *Held, per Cur.*, that if the evidence at the trial applies *equally* to the good and bad counts, the amendment may be made.

Where a declaration in a *qui tam* action for a penalty, under the statute 32 Hen. VIII., ch. 9, for buying a pretended title, states the facts which give a claim to the penalty, and then avers the right to the plaintiff to sue for and have the penalty for himself and her Majesty, to which the defendant pleads *nil debet*: *Held, per Cur.*, that the declaration sufficiently avers as a breach the nonpayment by the defendant of the penalty. *Held also*, that it is not necessary that the declaration should describe more particularly than it does, the land bargained and sold, at least after verdict.

This was an action *qui tam* for a penalty, under the statute 32 Henry VIII. ch. 9, for buying a pretended title.

The declaration contained three counts. In the first count the plaintiff declared "for that one Abel Conat, pretending right in and to "certain messuages, closes, lands, tenements and hereditaments, with the

“appurtenances, situate in the township of York, in the Home District, “and not regarding the statute made in that behalf, after the making of “the statute, namely, on the 10th day of July, 1844, at, &c., did unlawfully and contrary to the statute bargain and sell to the said Patrick Henderson his (the said Abel Conat’s) said pretended right in and to the “said messuages, &c., with the appurtenances; whereas, in truth and in “fact, neither the said Abel Conat nor any of his ancestors, nor any “other person or persons by whom he then claimed the said premises “with the appurtenances, had been in possession of the same, nor of “the reversion or remainder thereof, nor taken the rents or profits “thereof, by the space of one whole year next before the said bargain “made; and whereas in truth and in fact the right of the said Abel “Conat in and to the said messuages, &c., with the appurtenances, at “the time of the said bargain made, was a pretended right against the “aforesaid statute; and the said Patrick Henderson then and there well “knew that the said Abel Conat had only a pretended right to the messuages, &c., with the appurtenances, &c., and that the said Abel “Conat nor any of his ancestors, nor any other person or persons by “whom he then claimed the said premises, with the appurtenances, &c., “had been in possession of the same, nor of the reversion or remainder “thereof, nor taken the rents or profits thereof, by the space of one “whole year next before the aforesaid bargain made. Yet the said “Patrick Henderson, so then and there knowing the said right of the “said Abel Conat to be such pretended right as aforesaid, but not “regarding the statute, &c., did then and there, that is to say, on, &c., at, “&c., contrary to the said statute, buy and take of the said Abel Conat “the said pretended right of him the said Abel Conat in and to the “said messuages, &c., with the appurtenances, so bargained and sold to “him the said Patrick Henderson as aforesaid—the said messuages, &c. “then and there at the time of so buying and taking such pretended “right thereto as aforesaid, being of a large value, to wit, of the value of “2000*l.* of lawful money of Canada; by reason whereof, and by force of “the statute in such case, &c., an action hath accrued to the said “plaintiff, who sued as aforesaid, to demand and have of and from the “said Patrick Henderson for our said lady the Queen and for himself “the said plaintiff, who sues as aforesaid, the said sum of 2000*l.*, the “said value of the said messuages, &c., with the appurtenances, so by “him the said Patrick Henderson bought and taken as aforesaid.”

In the second count the plaintiff charged, “That the defendant “Patrick Henderson, on, &c., at, &c., contrary to the statute, and by “means of a certain indenture then and there made by the said Abel “Conat to the said Patrick Henderson, did get and obtain the right of “the said Abel Conat to certain other messuages, lands, &c., situate in “the said township of York”—not describing them more particularly.

This count further charged that the right of Abel Conat was a pretended right, and that neither he nor his ancestors, &c., had been a year in possession or in receipt of the rents and profits; and that Patrick Henderson, at the time of his so obtaining such pretended right, well knew that the said right of the said Abel Conat to the said messuages, &c., was a pretended right, &c., (but did not aver that the defendant well knew that neither Abel Conat nor his ancestors had been in pos-

session, &c., for a year next before the purchase, &c.); and it concluded "whereby and by force of the statute in such case made and provided "an action hath accrued to the plaintiff to demand from the defendant, "for himself and the Queen, the sum of 2000*l.*, the value of the said "messuages, &c., so by him the said Patrick Henderson bought and "taken as aforesaid."

The third count charged that the defendant bought of Abel Conat a certain pretended right, &c., which he the said Abel Conat then and there claimed in and to certain *other messuages* in the township of York, (not describing them), being then and there of great value, to wit, 2000*l.*, of which neither Abel Conat nor his ancestors, &c., had been in possession or receipt of the rents and profits for a year, &c. This count laid the *scienter* differently both as regards the right being pretended, and Abel Conat not being in possession, and "whereby an action hath accrued to "the said plaintiff, who sues, &c., to demand, &c., the sum of 2000*l.*, "the said value of the said messuages, &c., with the appurtenances " (not stating at what time) by him the said Patrick Henderson bought "and taken as aforesaid; and therefore, as well for our lady the Queen "as for himself in this behalf, the said plaintiff as aforesaid brings his "suit," &c.

The defendant pleaded, "that he did not owe to our said lady the "Queen, or to the said plaintiff who sued as aforesaid, or either of them, "the said sum of 2000*l.*, as in the said declaration alleged; and of this "he puts himself upon the country," &c.

At the assizes a general verdict was given for the plaintiff, for 500*l.* penalty.

*G. Phillpotts* moved to arrest the judgment, on the ground that the counts were all defective—at any rate, the second and third counts.

On the return of the rule, *A. Wilson*, asked leave to amend the verdict, by confining it to the first count.

This was objected to by *Phillpotts*, on the ground that it could only be done when it can truly be said that the evidence applied to the count on which it is desired to enter it, and to that only; and he contended that the evidence in this case applied no more to the first count than to the other two.

*G. Phillpotts*, upon the point of amendment, and upon the objections taken to the form of the declaration, and stated by the Chief Justice in his judgment, cited the following cases—1 Chy. Pl. 388; 1 Wils. 281; Com. Dig. Pleader, C. 44, 76; 2 Chy. Pl. 358; Hob. 198; 1 Saund. 228 note; 4 B. & Al. 625; 1 T. R. 141; Co. Litt. 4 (b.); Dyer, 74; Plowden, 81; 8 M. & W. 645; 1 B. & Ald. 161; 12 M. & W. 830; 2 M. & W. 427; 3 T. R. 435; 1 T. R. 153.

*A. Wilson* shewed cause, and relied upon *Beasley v. Cahill*, 2 U. C. R. 320; Went. Pre. vol. 7; 4 Burr. 2490; 1 T. R. 145, 545; 3 Burr. 1728; 4 T. R. 472; Cro. Car. 233; Partridge's case in Plowden's Reports. As to confining the verdict to the first count he cited—8 A. & E. 296; 8 Dowling, —; 3 M. & P. 310; 1 B. & P. 329; 2 Saund. 171; 1 Dougl. 376; 1 H. B. 78; 5 Taunt. 7; 2 M. & W. 427; 12 M. & W. 830; 2 B. & C. 819.

ROBINSON, C. J.—There are several cases to be cited, which seem to support the defendant's objection to the amendment; but I never



could believe that the language ascribed in them to the court, could have been intended to convey that meaning.

It has always appeared to me that what is meant by requiring that the evidence shall be applicable to the good counts only is, that there should be no evidence applying to the bad count which does not equally apply to the good, and on which therefore the jury may have given damages which they could not as properly have given under the good count; in which case I have no doubt it would not be proper to shift the verdict.

Lee v. Muggridge et al., 5 Taunt. 36, is a case like this in principle, and the court there compelled the plaintiff to elect on which count he would enter his verdict; and so would have allowed him, as we must suppose, to elect, if he had asked it. That was, like this, a case of laying the same cause of action in various ways.

Henly v. The Corporation of Lynn Regis, 6 Bing. 100, and 3 M. & P. 310, S. C., is strongly in point, to shew that it is correct to assume that when it cannot be said that evidence was given which might apply to the bad count, but could not apply to the good, and such as might have enhanced the verdict, then the amendment may be made. On the authority of these cases, and of Richardson v. Mellish, 3 Bing. 334, where the point was much discussed, it appears to me that I may properly allow the plaintiff to apply his verdict to the first count; and it is indeed a very strong authority, for there the court amended the verdict in the manner desired, after the learned judge who tried the cause had declined to do so. Here, I think, we ought to do it; and as my brother judges, after hearing argument on the point, take the same view of the matter, I have concluded to allow the amendment.

We have then to consider the case upon the objections moved in arrest of judgment, confining the view to the first count. If we should think the first count not sustainable, the practice seems now to be settled, and it is a convenient and reasonable practice, that a *venire de novo* should be awarded, not that judgment should be arrested; and as the court observes in the case which I have last cited, if upon a *venire de novo* the parties were to go down to another trial, of course the plaintiff could then of right confine his claim to the first count, so that if that is sustainable in point of law, and the evidence is clearly all as applicable to that as to any of the other counts, which it clearly is, there would be no object in granting the *venire de novo*.

It is objected to the first count that it has no conclusion. It states the facts which give the claim to the penalty, then avers the right to the plaintiff to sue for and have the penalty for himself and her Majesty; and the general conclusion applies to this count as to the others, that thereupon, as well for our lady the Queen as for himself, in this behalf the plaintiff brings his suit.—Plow. 77; 7 Wentworth, 216; 2 Chitty's Pleading, 158; 3 M. & W. 155; 7 Dowl. 206.

It is contended that there is a fatal defect in not averring a breach, in the defendant not having paid the penalty. As to that, some of the forms of the declaration in debt for penalties do contain that, but they do not all contain it, (7 Went. 202, Impey's Pleader, 49), but in this case we must remember that the defendant has pleaded *nil debet*, which it is clear would admit proof of payment, if the defendant had paid the penalty;

and therefore after verdict against him, we must conclude that he does owe the penalty, for that is the issue. There can be therefore no longer any doubt that he has not paid it.

Another objection urged is, that the particular premises bargained and sold ought to have been stated in the declaration, but I find it clear that this declaration is as particular in that respect as the law requires, and certainly the want of any more particular specification would be cured by verdict.

The only other objection which I understood to be urged against the first count is, that the penalty claimed is not shewn to be the value of the land at the time of the bargain, which constituted the offence; but I find the declaration in that respect agreeable to the forms, and it is stated to be the value of the land at the time of the transaction on which the penalty is laid to have attached. The first count appears to me to be a good count under the statute.

I have had some doubt, as this is the case of a prosecution for a penalty, under a statute treated as being almost obsolete in England, from whence we have adopted it, whether that might not properly be taken as a ground for declining to aid the plaintiff by amending the verdict, which undoubtedly is an act always discretionary on the part of the court. If this were the case of a vendor, who having really a good right had been disseised, and while his right was thus made a pretended right in the view of this old statute, solely by the wrongful act of another, had ignorantly conveyed, and so brought himself within the letter of the act, the reason would be stronger for declining to amend. But this is as flagitious a case as any that could arise under the statute, and if the provision is to be enforced in any case, it certainly may well be in this, for here the owner was all the while in actual possession by his agent and tenants, and a stranger seeing and knowing that, buys a pretended right from one who he well knew had no title in law or equity.

JONES, J.—It has been frequently held that an amendment of the *postea*, by entering the verdict on one count to which the evidence applied, when it had been entered at the trial on two or three, could only be done by the judge who tried the cause, or with his concurrence, but in the case in 6 Bing. 100, where the verdict was entered by consent on two counts, the court, on application of the plaintiff, amended the *postea* by entering the verdict on one (to which the evidence applied), although the judge who presided at the trial declined to interfere; and the same case shews that the evidence is not required to apply to the one count alone, if it appeared that although it applied to other counts, it all applied to the one upon which it was desired to enter the verdict, and that there was in fact but one cause of action although stated in different modes.

MACAULAY, J., concurred.

*Per Cur.*—Amendment allowed and rule discharged.

---

## DOE DEM. HENDERSON V. ROE.

Where the tenant in possession is shewn to have been acting in collusion with the lessor of the plaintiff in an action of ejectment, the court will set aside the judgment against the casual ejector.

Where the judgment is irregular, and the landlord when first applying to a judge in chambers to be admitted to defend as landlord, takes no notice of the irregularity, the irregularity is waived.

The court, though setting aside the judgment, will not order the tenant in possession to pay costs, but will leave the landlord to his remedy, under the statute 11 Geo. 2.

This was a rule nisi on affidavits, to set aside a writ of *Hab. fac. poss.* for irregularity, no judgment having been signed or entered in the cause, or to set aside the judgment against the casual ejector and all subsequent proceedings, on the ground of collusion between the lessor of the plaintiff and the tenant in possession, with costs, or to set aside the judgment and all proceedings thereon, and that Charles W. Lount, the landlord, be admitted to defend as landlord.

The landlord had moved in chambers before the Chief Justice, (16th July, 1847,) to be admitted to defend, taking no notice of any ground of irregularity.

A. Gorham moved the rule nisi, and cited the following authorities—3 Scott's N. R. 516; 3 G. & D. 477; 4 Q. B. R. 640; 3 N. & M. 717; 1 A. & E. 608; 2 G. & D. 518; 5 Dow. P. C. 59; 4 Dowl. 115; 3 Taunt. 506; 4 Taunt. 820; 2 Cr. & J. 682; 2 Harr. & Wooln. 130; 3 P. & D. 316.

P. M. Vankoughnet shewed cause, and referred to 2 Cr. & J. 682; 11 Price, 507; 3 Taunt. 506; 2 D. & L.—; 5 Taunt. 205.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the judgment against the casual ejector should be set aside without costs.

The tenant in possession appears to have been seeking a title from the lessor of the plaintiff, and concurring with him in allowing the possession to be changed, without notice to the landlord that any action was pending.

The grounds laid by the affidavits are strong for inferring collusion.

We do not set the judgment aside with costs on the ground of irregularity, because when the landlord first moved before a judge in chambers, he took no such ground, and therefore waived it, and we do not make an order on the tenant in possession to pay costs, but leave the landlord to his remedy under the statute 11 Geo. 2, especially as the affidavits are to a great degree conflicting.—11 Price, 507.

*Per Cur.*—Rule discharged.

## JAMES V. MILLS.

Upon the general issue in an action for malicious arrest, the writ is not admitted.

The sufficiency of a notice to produce, with respect to *the time* of service, seems to rest with the judge presiding at the trial.

*Quære.*—Can a notice to produce be served on the agent of the defendant's attorney?

*Quære.*—Has the plaintiff a right to call on the defendant's attorney in court to say whether he has or has not the writ in his possession?



The plaintiff sued in case for malicious arrest.

Plea, general issue.

The affidavit made by the defendant for holding the plaintiff to bail was put in and admitted.

The *ca. re.* was not produced, and in order to enable him to give secondary evidence of it, the plaintiff proved a search in the office of the deputy clerk of the crown for the district of Gore, where the suit had been brought, and also a search in the office at Toronto, both ineffectual.

He then proved a service of notice to produce the writ, made on the clerk of the agent of the defendant's attorney at Toronto, on the 18th of May, the assizes having commenced on the 11th of May, and the cause was tried on the 24th of May.

The learned judge held, that the notice was not served in time, and nonsuited the plaintiff.

The plaintiff's counsel proposed to call the attorney of the defendant, who was present in court, and to ask him whether he had not the writ there in his possession, but this was not allowed.

It was then contended by the plaintiff's counsel, that upon the general issue the writ was admitted, but the learned judge ruled otherwise.

*J. Duggan* moved to set aside the nonsuit, and cited 4 Dowl. 656; 1 M. & R. 260; 10 A. & E. 598; 9 C. & P. 478; 5 M. & W. 270; 14 M. & W. 249; Moo. & Mal. 235.

*Cameron, Sol. Gen.*, shewed cause, and cited 8 Dowl. 410; 6 M. & W. 410; 2 G. & D. 611; 3 Q. B. R. 79, S. C.; 2 Scott's N. R. 114.

ROBINSON, C. J.—I am of opinion that upon the general issue, in an action for malicious arrest, the writ is not admitted; it is involved in the denial, that the defendant caused the plaintiff to be maliciously arrested, for it was in this case the only means by which the defendant could have been liable for the arrest, which was the foundation of the injury complained of. He was not here proved to have done anything more than make the affidavit, which alone would not have shewn him to have procured the arrest, because it might never have been used, and though it might be proved that the sheriff arrested the plaintiff, yet it was indispensable to shew that he arrested him in that suit, which could only be shewn by the writ.

Then the notice to produce the writ was not served in time under the circumstances, being upon the defendant's attorney's agent, or rather upon his clerk, some days after the assizes had commenced, and in a different district from that in which the attorney's residence and office were, and where the writ consequently if in his possession must be supposed to be, for it would not be assumed that he brought it with him to the trial, as it would form no part of his client's case; and that distinguishes this case from some that have been decided on this point of practice.

The attorney was not bound to leave the court and go to Hamilton in order to procure the document, and it is not to be taken for granted that it could be procured by sending, and I am not at present sure that a notice to produce a paper is served upon an attorney at Hamilton, by serving it upon a clerk of the attorney's agent in Toronto, any more than a *subpoena duces tecum* could be so served.

It is not for such purposes, but for service of legal proceedings in a

cause, that service on agents will suffice, at least that is my present impression; besides, though the writ might have been in his possession, it was not shewn to be so, and there were other places where enquiry should have been made.

In *Coates v. Birch*, 2 Ad. & Ell. 252, the court of Queen's Bench refused to overrule the decision of the judge at the trial, who compelled the attorney to answer whether he had the paper or not, under similar circumstances.

The attorney said he had the paper, and then secondary evidence was given, and the court said, as there was a case agreeing with that view, (*viz. Moo. & Mal. 235.*) they would not interpose.

But I think here the party had not given due notice under the circumstances, and I would not overrule the decision made at *Nisi Prius*, unless in a perfectly clear case.

I think however, as this is a case in which the parties have been put to the expense of a second trial, we should not refuse to give him an opportunity of remedying the difficulty upon another trial, but may grant him a new trial on payment of costs, the judge being warranted by several decisions in England, and by one in our own court.

MACAULAY, J.—The issuing of the writ is not admitted but put in issue; if the issuing of the writ had been stated as in itself an innocent act, it would not be included in the traverse, but it is laid as a wrongful act; that is the difference.

Where the act is laid only as inducement or as innocent, and nothing wrongful is ascribed thereto, it is not denied, or if the *wrong* imputed as the *motive* is so laid as to be *separated* from the act, the act would not be denied, and put in issue by the general issue.

Where it is *inducement* to the wrong it is not put in issue—where it is a wrongful act alleged, it is.

As to the notice, there seems no general rule on the subject, but it very much rests with the judge presiding at the trial. If the defendant and his attorney, or the defendant's attorney, was in Toronto attending the assizes when the notice was served, and continued here from that time forward till the cause was tried, I should think the notice insufficient, but if he was at Hamilton at the time of such service, and for a reasonable time afterwards, to have brought it or sent it, if he did not attend, I should be disposed to think it would do.—10 M. & W. 478; 14 M. & W. 249.

The notice was in my opinion well served on the agent of the defendant's attorney, and it was not disputed that service on the clerk of such agent, was good service on the agent himself.

As to the plaintiff's right to call on the defendant's attorney to say whether he was in possession of the writ or not, the cases differ—M. & M. 235; 1 M. & R. 255, 201; 2 Q. B. 252; but the weight of authority seems in favour of it.

The learned judge was authorized by a former decision of this court in holding the notice too late, and though disposed to relieve against the nonsuit, it can only be on payment of costs—14 M. & W. 249; 10 M. & W. 478.

JONES, J., concurred in granting a new trial, on payment of costs.

*Per Cur.*—New trial on payment of costs.

## DOE DEM. PLACE ET AL. V. SKAE.

Where a plaintiff in ejectment capable of inheriting, and *primâ facie* entitled to inherit, makes out a reasonable case, the court will throw *upon the defendant*, especially if he be a stranger to the title, the onus of shewing a nearer heir. Where for instance the plaintiff, claiming by descent as the brother of an elder brother dying without issue, proved by persons connected with the family "that they had heard of the elder brother's marriage many years ago, but knew nothing of his having any issue:" the court held this evidence sufficient, in the absence of any proof to the contrary, to entitle the lessor of the plaintiff to recover.

Ejectment for lands in Whitby.

The lessors of the plaintiff claimed title as heirs at law of one Meredith Melvin.

The evidence to prove pedigree was obtained under a commission.

The patent for the land had issued in 1798, to Meredith Melvin, and the lessors of the plaintiff claimed as collateral heirs, one as a sister, and the others as children of another sister.

It was necessary to prove that Melvin died without issue and intestate, and it was contended that the fact of his having died without issue was not sufficiently proved to entitle the plaintiff to recover.

One of the witnesses examined, and who was nephew of the patentee, swore that he had heard that he was married; "Robert" (his brother) witness said, "left no issue, and I am not aware that Meredith left any."

To another interrogatory he answered, "I have no personal knowledge of Meredith Melvin ever having been married; he has for many years past been understood in the family to be dead; I have understood he died in England; I know nothing of his having any issue surviving him." In another answer he swore, "I understood that the said Meredith Melvin was in the navy; he was born in Canada, and how long he remained there afterwards I cannot say; he left Canada, at what time I do not know; I do not know what his destination was; he never returned to my knowledge; I believe he was heard of and seen by his sister Sophia after his departure, but how many years since I cannot say, but it must have been a good many years, near forty years ago, as she has not been in England since that time; he was then in the Royal Navy in England; I am not aware of his rising in his profession since his departure from this province, or of his having been reduced to a lower rank."

Another witness swore "John was not married; I understood Meredith was, but have no personal knowledge of the fact; neither William, Francis, James nor Alexander was ever married; I knew Meredith Melvin from his infancy until he left Quebec in 1796; he was a seaman and had been an officer in the Provincial Navy; the last time I saw him was in December, 1796; he never returned to the province; I have never heard of the said Meredith as living within the last twenty years, or for many years before that, nor has he been heard of by any member of his family to my knowledge during that period; I cannot say when he was last heard of."

The learned judge left the evidence to the jury, and they found for the plaintiff.

The Hon. R. B. Sullivan, Q. C., and Sheffington Connor moved for



a new trial on the law and evidence, and for misdirection; they objected to the recovery of the plaintiffs, on the ground that as there was some evidence of Meredith Melvin having been married, it was necessary to shew more clearly and certainly than was shewn under the commission, that he had died without issue; they cited as authorities upon this point, *Starkie on Evidence*, 15 E. R. 293; 14 Eng. C. L. R. 369; 15 Ib. 150; 17 Ib. 300.

*P. M. Vankoughnet* shewed cause in support of the verdict, and cited 3 Jur. 293; 15 E. R. 293; 8 B. & C. 22; 3 C. & P. 402; 4 B. & Al. 433.

ROBINSON, C. J., delivered the judgment of the court.

The case of *Richards v. Richards*, cited in a note to *Doe dem. Banning v. Griffin*, is relied upon by the defendants, in which case the court held, that where the plaintiff claimed as heir by descent and shewed the death of his elder brothers, but not that they died without issue, such proof was insufficient. "The plaintiff must remove (they said) every possibility of title in another person before he can recover, no presumption "being to be admitted against the person in possession."

This case seems to have been decided in 4 Geo. 2, and is cited in a manuscript note; it is not reconcileable, I think, with the later decision in the case to which it is appended as a note, for there the objection being, that the plaintiff should prove that a person through whom he claimed had died unmarried and without issue, and the proof respecting marriage being merely negative, that the party had died in the West Indies, and that the witness "had never heard in the family of his having been "married," the court held that such evidence was sufficient to call upon the defendant to give some evidence that the party was married: "for "what other evidence (they say) could the lessor be expected to produce, "that Thomas was not married, than that none of the family had ever "heard that he was;" now in that case it appeared that both the plaintiff and the defendant claimed under this Thomas Griffin, and so it may be supposed that they were really contesting the right to inherit, in which case stricter evidence is required. For all that appears in this case the defendants may have been strangers to the title, to whom it would be perfectly indifferent whether a collateral or lineal heir of Melvin proved to be the person entitled to succeed.

The defendants gave no evidence whatever of any right to the possession in them.

In *Doe dem. Lloyd v. Deakin*, 4 B. & Ald. 434, the language of the court expresses strongly the greater facility which is afforded to persons in later times, in making out title by descent, at least where the dispute does not turn upon the right of one of two parties to inherit, both resting their title upon evidence of heirship.

The question there was, whether a person who had been seen in England seventeen years before could properly be presumed to be dead; none of his relatives being called to speak to that fact, but merely evidence given by a stranger that he had not been seen in the neighbourhood where he had last been, and where the land was. The court say, "the probability "here is that as he was entitled to the property, he would come into the "neighbourhood to claim it. If any of the family had heard of him since "1804, they might be called to rebut the presumption, and if Tannatt be "still alive he may recover the possession from the lessor of the plaintiff."

I adhere to what was said by me in *Doe dem. Sullivan v. Read*, 3 U. C. Rep. 293, and in other cases we have acted upon the same principle, fully borne out as I consider it to be by English decisions.

The inconvenience of exacting such evidence as would remove all possibility of a better title, would press most heavily in this country, from obvious causes, where pedigree would have to be proved in so many cases by evidence to be obtained from abroad, and often with respect to the pedigree of obscure persons.

Upon the principle expressed in *Richards v. Richards*, an overholding tenant, when his landlord died, might resist the recovery of his nearest relative by putting him to proof that it would be most difficult and expensive to procure. It is surely more reasonable to hold, as against a stranger, that where a person capable of inheriting and *primâ facie* entitled to inherit makes out a reasonable case, it should be thrown upon the other party to shew a nearer heir if there be one, and not to throw obstacles in his way by the mere surmise that there may be a nearer heir; for as the court observes in *Lloyd v. Deakin*, "if a person better entitled makes his appearance, he may recover possession from the lessor of the plaintiff."

In *Rowe v. Hasland*, 1 Bl. Rep. 404, this principle is fully confirmed.

It is said that the evidence in this case was evasive, that is, the answer to the interrogatories.

I doubt whether they were intended to be so, but they were left to the jury with fair remarks, and they have come to a conclusion not shewn to be incorrect.

In the case cited from 15 E. R., 293, the evidence of the witness that she had never heard in the *family* of Thomas Griffin having been married, might as well have been suspected to be evasive, for it might have been said, if she knew it or had heard of it from any quarter, she should equally have declared it.

It is true that in this case there is some evidence of Melvin having been married; the witnesses had heard he had been, they did not speak positively; they evidently, I think, believed he had been married abroad many years ago, perhaps thirty or forty, but they knew no particulars; they had not heard of him for more than twenty years, and believed that he had not left any issue, or at all events swore they were not aware he had.

I do not think that we should presume there was any dishonest intention in the witnesses to give evasive answers; a great deal will depend in all such cases on the terms in which the question is put. If we were to scan the words of an answer scrupulously, in order to see whether notwithstanding its obvious import, it might not admit of some secret reservation, many commissions executed at great expense to the parties in distant countries would be rendered fruitless, by indulging in mere surmises.

The defendants in this ejectment had every reason and motive to enquire into the state of the family of the original grantee of the crown, and if there had been any issue left by him, they have had full opportunity to procure proof of it, and can yet do so, though not for the purposes of this action.

The plaintiffs, I think, should receive the benefit of their verdict.

Whether the case may or may not be a hard one, we have not means of forming any safe opinion, for the defendants did not produce whatever title they may have supposed they had; they entered into no evidence. The property is said to be very valuable; if that is a reason on one side for desiring to protect the possessors, it is a stronger reason on the other for securing the aid of the law to the lawful proprietor, whoever or wherever he may be, for rights of property must be held sacred in administering the law.

*Per Cur.*—Rule discharged.

---

ANDERSON V. HAMILTON.

Trover, as well as detinue, may be maintained for leases or other title deeds.

Trover for a certain indenture of lease made between the Rev. Charles Winstanley and one Francis Lewis, demising to Lewis certain tenements for a term therein mentioned and unexpired; and for a deed poll made by the said Lewis to one Robert Scrafford, assigning to him the first mentioned indenture, and all Lewis's right and interest in the same, and the premises therein mentioned; and a certain other indenture of assignment made between the said Scrafford and the plaintiff, whereby Scrafford assigned to the plaintiff all the right, title and interest which he had to the said first mentioned indenture, and the premises therein contained; and also his the said Scrafford's right in and to the said deed poll, of great value, to wit, 100*l.*, charging a conversion in the usual form.

The defendant pleaded, first, not guilty.

Secondly, plaintiff not possessed of the said deeds, goods and chattels, as of his own property.

It was proved on the trial that Anderson having purchased from Scrafford and made some improvements on the land, which was leasehold, was in treaty for disposing of his interest to one Thomas, and took the papers mentioned in the declaration to an attorney, to prepare mutual bonds between him and Thomas; that Thomas some days after went to the attorney with an untrue statement, that the plaintiff had authorised him to get the papers, in order that he might get a lease direct from Mr. Winstanley to him, and the attorney believing him, gave him up the papers. Discovering that he had not the plaintiff's authority, and that the papers had got into the hands of this defendant, the attorney went to the defendant and told him that he must either stand in the place of Thomas, and enter into bonds as he was to have done, or must give up the papers. The defendant said he would explain it, and the attorney was led by his statement to draw up bonds between him and this plaintiff, as upon an intended purchase, but the defendant in the end refused to execute any bond, and the attorney then demanded the papers, and upon the defendant's refusing to give them up the plaintiff brought this action.

The lease from Winstanley to Lewis was for a term of twenty-one years, from 25th July, 1844, at a rent of 6*l.* 12*s.*

The bond from the plaintiff to Thomas had been executed with a condition, that he should assign to Thomas if he should make certain payments, and in the bond it was recited, that Thomas had agreed to buy this plaintiff's interest for 90*l.*, and it was admitted on the trial



that this bond had been assigned to the defendant, who thus stood in Thomas's place, and had paid the rent for some time, and also paid the taxes with the plaintiff's privity, who referred the collector to him.

The defendant, it appeared, after the plaintiff's attorney first demanded of him to execute a bond as Thomas was to have done, or to give up the papers, assigned his interest to another party who was unable to pay, and transferred the papers to him.

It was not shewn whether Thomas had or had not failed in paying the 90*l.*, but the plaintiff admitted that he had received 15*l.* on account of it, and he claimed at the trial a sum in damages equal to the residue of the 90*l.*, which he was to have had for the leasehold property, complaining that being deprived of all his papers, he could not effectually pursue his remedy for getting into possession of his land.

The jury gave a verdict for plaintiff, and 75*l.* damages.

*J. Lukin Robinson* moved for a new trial on the ground of misdirection—the form of action should have been *detinue* and not *trover*.—3 M. & G. 242, (note); 3 Scott N. R. 577.

*A. Gorham* shewed cause, and cited 6 Taunt. 12; 5 D. & R. 49.

ROBINSON, C. J.—It appeared to me that the bond which the plaintiff had given to Thomas did not make him owner of the land, and that he was therefore not entitled to the deeds; that the plaintiff was therefore still entitled to the deeds as owner, if he had never consented to give them up to Thomas, with whom he had contracted, and it was proved that he had not consented. He was entitled to have them till he could be called upon to make a title.

I thought that the paying the rent or taxes did not shew the occupant entitled to the term or deeds.

As to the damages, I told the jury I could give them no precise rule for estimating them, for it did not follow that the plaintiff had lost the value of his property because his deeds were detained from him, and if they should give the value of the property, the effect of the verdict would not be to make the defendant owner of the estate.

The court determines that the plaintiff was entitled to recover on the evidence, because the defendant had taken upon himself to transfer the deeds to another, after the plaintiff's attorney had demanded them from him, when they were clearly the property of the plaintiff, and the defendant was made aware of the plaintiff's desire to have them.

This was a clear act of conversion, and it became immaterial to discuss the question, whether the defendant could be found guilty of a conversion, upon the evidence of a subsequent demand and refusal.

It has been contended that he could not, because at that time he had no longer the deeds in his possession, and could not give them up, which is true.

The case however went off upon a compromise, the court suggesting that as the verdict was founded on a calculation of what was still due to the plaintiff on the land, which land in fact continued as much his as ever, notwithstanding his loss of his deeds, that he should agree to convey the land to the defendant when he received the amount of the verdict, otherwise judgment not to be entered without further application to the court.

MACAULAY, J.—I think the weight of authority is in favour of an action of *trover* for a lease or other title deeds, though *detinue* will also lie and might be the preferable remedy.

As to the evidence it sufficiently shews a conversion, and the jury were at liberty to give substantial damages, not exceeding the value of the premises demised.—2 Lev. 220; 3 B. & Ad. 170; Harrington v. Price, 1 Dowl. & R. 201.

JONES, J., concurred.

*Per Cur.*—Rule discharged on the terms mentioned by the Chief Justice.

#### RAMSAY ET AL. V. THE WESTERN DISTRICT COUNCIL.

The clerk of a district council can only charge the council by such acts as are within the scope of his general authority, or by such as they either directed beforehand, or afterwards sanctioned, either expressly or by availing themselves of, to their advantage.

The district council have no power to authorise their clerk or agent to make any contract for the purchase of books for the several common schools throughout the district—such a contract “not being necessary for the exercise of their corporate functions.”

Assumpsit for goods sold and delivered to the defendants, and money paid to their use.

This action was brought by the plaintiffs, who are booksellers and stationers, to recover a sum of 60*l.* and upwards, claimed as due from the District Council for school books which one Cowan, while clerk of the District Council, had ordered; and which it was sworn had been read, examined and approved of in the District Council.

The defence was, that the ordering of these books was a personal transaction of the clerk, who had since left the country—that the books were not furnished on the credit of the council, though they had signified to the clerk their approval of such books being procured, on the supposition that they would be acceptable and useful in the common schools.

The nature of the transaction, as between Cowan and the plaintiffs, appeared from correspondence produced on the trial.

It seemed that the Western District Council, in November, 1845, received a report from the District Superintendent of Common Schools, recommending that every encouragement should be afforded towards endeavouring to procure a uniform series of books for schools, *more particularly those published by the plaintiffs at Hamilton and Montreal.* That Cowan did, by letter written soon afterwards and signed by him as Clerk of the Western District Council, order the books in question, and gave the plaintiffs to understand that the council approved of samples which had been inspected by them; and that they had instructed him to give out the books, when they should arrive, to the several applicants, charging costs of transportation to the contingent school fund; and *to remit* to the plaintiffs, as soon as the amount disposed of should render it an object to do so: that the books were sent up to Cowan in December and January; and that in January, Cowan, at the request of the plaintiffs, sent them his promissory note at three months for 50*l.* on account—probably to enable them to procure a discount—but at the same time remarking, that the giving such a note was not contemplated by his order: that Cowan ordered about the same time small supplies of

stationery for the use of the District Council, for which the Warden issued his warrant promptly, and the plaintiffs were paid.

There was no evidence, however, except from Cowan's own letters, that he was in fact authorised, either expressly or tacitly, by the District Council to order the school books on their credit, or on any terms; and except the circumstance that in November, 1845, and before the order was given, a report of the District Superintendent of Schools, containing the recommendation above mentioned, was presented to the District Council, and was printed in their minutes by their order, it was not shewn that that report was in any manner acted upon or adopted.

The jury, on this evidence, found a verdict for the defendants, on the ground that they were not liable.

*C. Foster* moved for a new trial on the law and evidence; he relied upon the sanction which the council undoubtedly gave to the act of their agent Cowan in the purchase of the books, as binding upon the council and making them liable to this action.

The Hon. *S. B. Harrison* shewed cause; even supposing the evidence was conclusive, as to the fact of a direct sanction on the part of the council to Cowan's purchase, still the council would not be liable on such a contract, as it is clearly one "not necessary for them to make in "the exercise of their corporate functions"; and therefore not one which under the statute 4 & 5 Vic., ch. 10, the plaintiffs could enforce against the council. The council have no right to pledge the funds of the district for any such purpose, and this the plaintiffs should have considered before entering into the contract.

ROBINSON, C. J.—I am of opinion that the verdict was properly rendered for the defendants, upon the evidence.

Although Mr. Cowan was the clerk, and in that sense the agent of the Council, he could only charge them by such acts as were within the scope of his general authority, or by such as they either directed beforehand, or afterwards sanctioned, either expressly or by availing themselves of such acts to their advantage.

Now we must notice judicially, that to select, order, and distribute books to the general common schools throughout the district, is no part of the duty of the District Council by law; and consequently cannot be within the scope of any authority which they can be supposed to have committed to their clerk.

The duty of selecting school books to be used is committed by law to the trustees of the several school districts (7 Vic. chap. 29, sec. 44); and the District Council, so far as I can discover, have nothing to do with it.

There can, therefore, be no implied general authority from the District Council to transact such business. And as to any evidence of a particular direction or sanction, it is not made out conclusively, because there is nothing to shew it but what may be gathered from Mr. Cowan's own letters, which of course cannot make the District Council liable in any matter not within the line of his duty; otherwise, he could without their sanction or knowledge commit the funds of the district by any ill-advised contract into which he might have chosen to enter.

I should not lay stress upon the fact of Cowan having given his promissory note for part of the amount, because there is ground to infer,



from all that we see of that transaction, that that was not done for any other purpose than to give to the plaintiffs the convenience of a discount in the interval which must elapse before the books should be disposed of and paid for; still that was a fact to be considered by the jury.

But, besides other grounds peculiar to the case, and admitting (which I am inclined to believe was the case) that the plaintiffs were led by Cowan to suppose, and really did suppose, that they were furnishing the books upon the credit of the District Council, and upon their order; yet I consider that there is this obstacle against the plaintiffs' recovering on any demand of this kind—that the District Council is a public body, created by statute for certain specified purposes, and with certain specified powers; that their control over the district funds is limited, and their power to make contracts is limited, (and that expressly by the first clause of the statute 4 & 5 Vic. chap. 10,) to such contracts as may be necessary for the exercise of their corporate functions; and that it is not every contract which individuals may choose to make with them that can be made the foundation of a charge through them upon the district funds. If such a disbursement as that now in question does not come within the range of their corporate functions, then it must stand on the same ground as any other debt unconnected with those functions; and if the district funds could be made liable to pay this debt merely because the council, contrary to law, or at least without legal authority, chose to incur a liability, then on the same principle, they might order arms for the militia, or irregularly interfere in any other department of the public service, and might apply the funds of the district to objects never contemplated by law.

Individuals dealing with them are bound to notice the objects and limits of their power; and it is of much consequence that it should be borne in mind that their acts, when beyond the scope of their authority, are nugatory, and cannot pledge the public funds which they are to administer.—10 Jurist, 308.

MACAULAY, J.—It was not necessary for the exercise of the corporate functions of the defendants, that they should enter into a contract for the purchase of school books. They are sought to be charged upon an implied promise to pay; and to sanction such a demand against such a corporation, nothing short of the most unequivocal acts of adoption and acceptance would do, and they are not shewn here.

It appears to me the books were ordered by the clerk of the council, and delivered by these plaintiffs, in reliance upon the school fund as the source from which payment was expected. This is alluded to in one of the letters in evidence, and however hard the disappointment and loss may be as respects the plaintiffs, I do not see that they have any direct remedy against the defendants.—6 M. & W. 815, Mayor of Ludlow v. Charlton.

JONES, J., concurred.

*Per Cur.*—Rule discharged.

## LONG V. LEE.

To a declaration for "maliciously causing the plaintiff to be arrested," the defendant pleaded "that he did not make the affidavit stated in the declaration." To this the plaintiff demurred, assigning for special cause, that the plea amounted to the general issue; and that while professing to answer the whole cause of action it answered only a part; and that it tendered an immaterial issue. *Held, per Cur.*, plea bad, as professing to answer the whole while it only answered a part, and as tendering an immaterial issue.

To a declaration for "maliciously causing the plaintiff to be arrested," the defendant pleads "that he did not make the affidavit stated in the declaration.

To this the plaintiff demurred, assigning for special cause, that the plea amounted to the general issue; and that while professing to answer the whole cause of action, it answered only a part, and that it tendered an immaterial issue.

*H. Eccles*, for the demurrer, cited 3 A. & E. 312; 3 M. & G. 202; 10 Jur. 1061.

*J. Duggan, contra*, referred to 5 M. & W. 270; 7 Dowl. 498; 3 M. & W. 188; 3 Doug. 75.

ROBINSON, C. J.—The plea is in my opinion bad, as it tenders an issue upon a fact not material to the action.

If all that is said about the affidavit was struck out, the declaration would still contain a sufficient statement of a cause of action.

The setting out of the affidavit was unnecessary, but being set out it is argued that the plaintiff must have proved it at the trial on the general issue, though I do not at present think he would have to do so; and it is contended that being thus made by him an indispensable part of his case, if the defendant in pleading denies it, he cannot be said to tender an issue upon an immaterial fact, but I consider that the necessity of proving it would at any rate apply only to the principle of evidence at the trial, in the same manner as where the plaintiff suing on a contract sets out more of it than he need do; he thus renders it necessary to prove such a contract as he has set out, and a clear variance in a part not necessary to have been set out at all will be fatal, but it does not therefore follow that the defendant could plead, that he did not agree to do something alleged in the contract, which has no connection with the breach sued on.

If the defendant in this case had pleaded the general issue, that perhaps would admit the affidavit as matter of inducement, but still the plaintiff would have had to bring other proof besides that, to shew that the defendant had caused him to be arrested, for the affidavit might have been in the office and never have been used.

It could not of itself constitute a direction or authority to arrest, but would be merely a step in the matter which might or might not be material. The substantial question would be, who *caused* the plaintiff to be arrested. The person who makes the affidavit may take no further share in the matter, and if he does not, that would not make him liable for the arrest.

An agent might make an affidavit on false information given him by the principal, and if the latter took the writ to the sheriff, he would be the person liable if he acted maliciously, and not the other, and so he would be as being the plaintiff in the cause if he acted maliciously, without being the person that either made the affidavit or took the writ to the sheriff.

Striking out all that is said about the affidavit, there will still be a consistent, connected statement of a sufficient cause of action, namely, the delivery by the defendant of the writ to the sheriff, thereby procuring the plaintiff to be arrested at his suit, when the defendant well knew that he had no cause for believing that the plaintiff was immediately about to leave the province; then as the defendant by traversing the affidavit alone admits all the rest, and thus leaves a complete cause of action unanswered, the plaintiff is entitled to judgment, for we cannot hold that the plea denying the making of the affidavit is an answer to the whole injury complained of, though it is pleaded as such.

MACAULAY, J.—I think the plea bad as being pleaded to the whole declaration, and yet only answering part of it.

I do not think it amounts to the general issue; it traverses a single special and material point in the declaration, and if being found for the defendant it would destroy the whole count, it would be a good plea though it left other parts unanswered and undenied, but if not, then the plea professes to answer more than it does answer, and is bad on that ground.—3 M. & G. 702; 10 Jurist, 1061.

JONES, J.—The declaration would have been good without the allegation, the arrest being the grievance for which this action lies; the declaration being good without it the allegation is surplusage, and therefore not material and not issuable.

It is stated as inducement or as a link in the case, and is moreover charged as being done falsely and maliciously, and if a part of the grievance complained of, it is answered by the general issue.

Although an unnecessary allegation, as would appear from the following authorities—1 B. & P. 288; 5 T. R. 446; 2 Doug. 665; 2 Black. 1101; Esp. N. P. 536; yet being set out it might perhaps be incumbent on the plaintiff to prove it at the trial, but I rather apprehend under the new rules he would not be required to do so.

I think there must be judgment for the demurrer. The case cited in argument of 3 Ad. & Ell. 312, is a strong case to shew, that under the general issue the defendant could give in evidence proof that no such affidavit was made, if it was a material allegation, and the plaintiff bound to prove it.

*Per Cur.*—Judgment for the plaintiff on demurrer.

SIR JAMES MCGREGOR ET AL. EXECUTORS OF JAMES CHISHOLM V.

REMIGIUS GAULIN ET AL.

The rendering an account by the plaintiff's attorney in this province (the plaintiff residing abroad), is not binding finally on the plaintiffs as to the mode of calculation; and even where the plaintiffs themselves in the first instance incorrectly state an account, they may have it legally adjusted at any time before a final settlement.

Where the defendant is making payments to the plaintiff on account of a loan, the plaintiff may insist, in the absence of any agreement to the contrary, that his payments be applied in the first place to keeping down the interest. The method usually adopted in making out an account between debtor and creditor, upon a loan of money; viz., that of charging first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest—is *not the correct way* of arriving at the balance. It is so much in favour of



the *debtor*, that where there has been a long arrear of interest, and payments made on account by the debtor not covering the interest alone, the debtor in a few years, without adding any payment in the mean time, will make *his creditor his debtor* to a very large amount.

**Special case.**—This was an action of covenant, brought by the plaintiffs as executors, against the defendants as executors, to recover the sum of 856*l.* 1*s.* 5*d.*, and interest on that sum from 19th Sept, 1846.

The defendants pleaded payment of the amount claimed by the said plaintiffs, excepting as to 111*l.* 7*s.* 10*d.* on which issue had been joined, and as to the 111*l.* 7*s.* 10*d.* a tender of that sum before action brought, on which issue had been joined. And by the consent of the attornies for the plaintiffs and defendants, and by order of a judge, the following case was stated for the opinion of the court.

That by an indenture made the 15th of August, 1820, by and between The Right Reverend Alexander Macdonell, Roman Catholic Bishop, (the testator of whom the defendants are the executors,) of the one part, and Lieutenant-Colonel James Chisholm (the testator of whom the plaintiffs are executors,) of the other part, the said Alexander Macdonald in consideration of 957*l.* sterling, to him by the said James Chisholm, paid, granted &c., to the said James Chisholm, his heirs and assigns, divers parcels of lands, situate within that part of the province of Canada, formerly called the province of Upper Canada; subject to this proviso, that if the said Alexander Macdonell should pay to the said James Chisholm, his heirs &c., the sum of 975*l.*, on or before the 1st January, 1826, with interest at six per cent., then the said mortgage to be void.

That Baldwin & Son, the present attornies of the plaintiffs, on the 4th of December, 1846, sent the following statement to Thomas Kirkpatrick, one of the present defendants:—

Mortgage money .....	Sterling, £ 975 0 0
Interest on the same, from 1st Jan. 1820, to 1st Jan. 1847...	1579 10 0

	£2554 10 0
Difference of Currency .....	283 16 8

£2838 6 8

Credits claimed by the Bishop's Estate, as contained in one of Thomas Kirkpatrick's former letters, which Baldwin & Son assumed to be correct, but of which in fact they knew nothing.

		Principal.	Interest.
1828.			
August 21.	Cash .....	£400 2 7	£440 14 9
1831.			
March 27.	" .....	200 0 0	189 2 6
April 23.	" .....	298 10 0	280 19 3.
July 27.	" .....	180 0 0	166 12 6

The following credits Baldwin & Son know to be correct.

1845.			
June 25.	Mortgage ...	£100 0 0	£ 9 2 0
1846.			
June 18.	Cash .....	300 0 0	9 13 0
Sept. 19.	" .....	149 12 6	2 9 9

Principal .....	£1628 5 1
Interest .....	1098 13 9

£2726 18 10

Balance due on Mortgage .....	£ 111 7 10
-------------------------------	------------

That Baldwin & Son, on the same 4th of December, wrote to the former solicitors, in London, of the estate of the said James Chisholm, giving a statement similar to the above, and also a like statement to Samuel Newton, of Quebec, the agent of the said executors of the plaintiff.

That on the 18th of the same month of December, Baldwin & Son received from Mr. Newton the following letter referring to the statement sent to him; "with reference to the statement of the account contained in your letter, I beg to observe, that it is not in accordance with the mode of making it out adopted by the executors of the late Lieutenant-Colonel Chisholm; I send you herewith a statement made up from one forwarded to me with the power of attorney, and which should form the basis of the final settlement; by this it appears that the balance due on the mortgage is 856*l.* 1*s.* 5*d.*, that is 736*l.* of the principal, and 120*l.* 1*s.* 5*d.* balance of interest, and not 111*l.* 7*s.* 10*d.* as mentioned by you; and as I shall be under the necessity of claiming the sum I have stated, unless the executors should instruct me to the contrary, I shall feel obliged by your handing to the representatives of the late bishop, a copy of this statement, so as to inform them of the correct balance due by the estate; on this very important point, however, please have the goodness to state your opinion." That the following is the statement which was sent by Mr. Newton to Baldwin & Son, as mentioned in his letter just quoted:—

Principal sum .....	£ 975	0	0	
Difference of Currency .....	108	6	8	
	<hr/>			
		£1083	6	8
Interest from 1st Jan., 1820, to 31st Aug., 1828, —8 years and 8 months.....	£563	6	8	
1828.				
August 31. Paid on account .....	400	2	7	
	<hr/>			
	£163	4	1	
Interest on £1083 from 21st August, 1828, to 27th March, 1831—2 years, 218 days.....	168	15	5	
	<hr/>			
1831.	£331	19	6	
March 27. Paid on account .....	200	0	0	
	<hr/>			
	£131	16	6	
Interest on £1083, from 27th March, 1831, to 23rd April, 1831—27 days .....	4	16	1	
	<hr/>			
1831.	£136	15	7	
April 23. Paid on account .....	298	10	0	£161 14 5
	<hr/>			
		£921	12	3
Interest paid in full, and on account of prin- cipal £161 14 5.				
Interest on £921, from 23d April to 27th July— 95 days.....	14	7	9	
1831.				
July 27. Paid on account .....	200	0	0	£185 12 3
	<hr/>			
		£736	0	0
Balance of principal due, as per account made to this date by D. Stoddart, Agent to exe- cutors in London.				

CONTINUATION.		<i>Bro't forward £736 0 0</i>	
Interest on £736, from 27th July, 1831, to 25th June, 1845—13 years, 10 months, 29 days	614 7 9		
1845.			
June 25. Paid on account .....	100 0 0		
	<u>£514 7 9</u>		
Interest on £736, from 25th June, 1845, to 18th June, 1846—11 months, 23 days .....	44 5 5		
1846.	<u>£558 13 2</u>		
June 18. Paid on account .....	300 0 0		
	<u>£258 13 2</u>		
Interest on £736, from 18th June, 1846, to 19th September, 1846—3 months .....	11 0 9		
1846.	<u>£269 13 11</u>		
Sept. 19. Paid on account .....	149 12 6		
	<u>£120 1 5</u>	<u>£120 1 5</u>	
Balance of Interest due .....		<u>£856 1 5</u>	

And Interest on £736, balance of principal, due from 19th Sept., 1846.

That a copy of the above statement was sent to the said Thomas Kirkpatrick by Baldwin & Son on the 17th day of December, 1846.

That on the 27th of February, 1847, Baldwin & Son received the following copy of a letter:

"Gentlemen,

"I have to acknowledge the receipt of your letter of the 4th of December, to the late firm of Messrs. Stoddart & McGregor, and with reference thereto I enclose the authority of Sir James McGregor, executor of the late Col. James Chisholm, for you to remit me the sum you have received from the estate of the late Bishop Macdonell and others; I beg to call your attention to the enclosed calculation of the balance still due on the late Bishop Macdonell's bond, amounting to 778*l.* 8*s.* 4*d.*, and which I suspect you will find to be correctly calculated, &c., &c.

CHARLES MCGREGOR."

That the following is the statement sent by the said Charles McGregor in the letter last quoted.

		<i>Interest.</i>
Principal .....	£975 0 0	
Interest on £975, from 1st Jan'y, 1820, to 21st August, 1828—8 years, 234 days .....	£505 10 0	£505 10 0
1828.		
Cash paid Stoddart & Co., of Quebec, £400 2 7 curr'y, or ster'g	360 2 3	
	<u>£145 7 9</u>	
Interest on £975, from 21st August, 1828, to 27th March, 1831—2 years, 218 days .....	151 18 8	151 18 8
1831.	<u>£297 6 5</u>	
March 27. Cash paid Stoddart & Co., £200 currency, or sterling	180 0 0	
	<u>£117 6 5</u>	<u>657 8 8</u>



	<i>Principal.</i>						<i>Interest.</i>		
<i>Bro't forward</i> .....	117	6	5	975	0	0	657	8	8
Interest on £975, from 27th March, 1831, to 23d April—27 days...	4	6	5				4	6	5
1831.	£121 12 10								
April 23. Cash paid Stoddart & Co., £298 10 curr'y, or sterl'g	268	13	0	147	0	2			
Balance of principal due this day.....	£827 19 10								
Interest on said balance, from 23rd April, 1831, to 29th July—97 days.....	13	4	0				13	4	0
1831.									
July 29th, Cash paid Stoddart & Co., £200 currency or sterling	180	0	0	166	16	0			
Balance of Principal due this day.....	£661 3 10						674	19	1
Interest on £661 3 10, from 29th July, 1831, to 25th June, 1845, 13 years and 331 days .....	551	13	7				551	13	7
1845.									
June 25, Cash paid Baldwin & Co. £100 currency or sterling ...	90	0	0						
	£461 13 7								
Interest on £661 3 10, from 25th June, 1845, to 18th June 1846 —358 days .....	38	18	2				38	18	2
1846.	£500 11 9								
June 18th, Cash paid Baldwin & Co., £300 curr'y, or sterling...	270	0	0						
	£230 11 9								
Interest on £661 3 10, from 18th June, 1846, to 19th September, 1846—93 days .....	10	2	1				10	2	1
1846.	240 13 10								
Sept. 19th, Cash paid Baldwin & Co., £149 12 6 cur. or sterling	134	13	3						
	£106 0 7								
Interest on £661 3 10, from 19th Sept., 1846, to 1st Jan., 1847 —103 days.....	11	3	11	117	4	6	11	3	11
Balance due 1st January, 1847.....	£778 8 4						£1286	16	10

## RECAPITULATION.

Principal.....				975 0 0		
Progressive Interest as above received .....				1286 16 10		
1828—Aug. 21, Cash £400 2 7 c'y or sterl.	360	2	3			
1831—March 27, do. 200 0 0 “	180	0	0			
April 23, do. 298 10 0 “	268	13	0			
July 29, do. 200 0 0 “	180	0	0			
1845—June 25, do. 100 0 0 “	90	0	0			
1840—June 18, do. 300 0 0 “	270	0	0			
Sept. 19, do. 149 12 6 “	134	13	3			
	<u>1483 8 6</u>					
Balance due 1st Jan. 1847.....	<u>778 8 4</u>					
	<u>£2261 16 10</u>			<u>£2261 16 10</u>		

That on the same 27th February, 1847, Baldwin & Son sent a copy of the last statement to the said Thomas Kirkpatrick.

That Baldwin & Son had been corresponding with the said Thomas Kirkpatrick for some length of time before they knew of any payments having been made upon the mortgage, and that in such correspondence the principal money of the mortgage, with the whole amount of interest in one sum, was stated and claimed.

That the said Thomas Kirkpatrick afterwards informed Baldwin & Son, that the payments anterior to the one of 100*l.* on the 25th June, 1845, had been made and allowed by Mr. Newton, for which he claimed a credit from the gross amount of principal and interest aforesaid, and also interest upon such sums from their respective times of payment.

That the said Baldwin & Son then allowed such payments alleged to have been made, as credits to be given to the bishop's estate, and interest upon them respectively from the times of their payment, and such credits were continued to be given till the 4th of December, 1846, as appears in their letter above stated, and in the manner therein contained.

That the said Thomas Kirkpatrick had received statements of account before the 25th June, 1845, from the said Samuel Newton, in which the interest was reckoned and claimed as above in the statement set forth transmitted by the said Samuel Newton to Baldwin & Son.

That the said Baldwin & Son did not know till after the 4th of December, 1846, that such statement had been sent to or received by the said Thomas Kirkpatrick, stating and claiming the interest differently from the way in which it was stated by them.

That the following is a copy of a letter written by the said Thomas Kirkpatrick, in answer to a statement made out and sent by the said Samuel Newton to the said Thomas Kirkpatrick, in which the said Samuel Newton claimed the interest as he had done in the statement above set forth, sent by him to Baldwin & Son : —

“Kingston, 28th Sept., 1840.

“SAMUEL NEWTON, ESQ.,

“Sir, I am favoured with your communication of 21st inst., addressed to Right Rev. R. Gaulin and myself as executors of the late Bishop Macdonell, on the subject of a claim against the estate in favour of the heirs of the late Lieutenant-Colonel Chisholm, and in reply beg to say that negotiations are now pending on the subject of this claim, between the Rev. Angus Macdonell, nephew of the late bishop, and the heirs in Scotland, when I trust a satisfactory arrangement will be entered into. A sale of the real estate of the late bishop took place a short time ago ; it was however partly on credit, and as there are large claims against the estate, it will be sometime before a final settlement can be made with the creditors ; you will oblige me by sending at your leisure a copy of the bond of the late bishop, and also informing me whether administration has been granted to the estate of the late Colonel Chisholm in Upper Canada.

I remain, your obedient servant,

THOMAS KIRKPATRICK,  
Executor, &c.”

The question for the opinion of this honourable court was, in what manner, under all the circumstances of the case, should the interest be charged by the plaintiffs against the defendants?

And it was further agreed, that the court might refer this cause to the Master to compute the amount payable to the plaintiffs, according to the order and directions which this honourable court should give therein. And that if judgment herein should be given by this honourable court for the plaintiffs for only 111*l.* 7*s.* 10*d.*, then the plaintiffs should be at liberty to enter up judgment by *nil dicit*, or otherwise to recover that sum, unless the defendants should bring that amount into court within two weeks after the giving of such judgment. And when the defendants should bring that sum into court, that the plaintiffs, if judgment should be given for that sum only, should enter a discontinuance of this action. But if judgment should be given for the plaintiffs for a greater sum than 111*l.* 7*s.* 10*d.*, then the plaintiffs should be at liberty to enter a judgment against the *defendants* by *nil dicit*, or otherwise to recover such amount, for which judgment should be given.

ROBERT BALDWIN,  
*Plaintiffs' Attorney.*

JAMES J. BURROWES,  
*Defendants' Attorney.*

ROBINSON, C. J.—I think that the rendering an account by the plaintiff's attorney in this country is not binding finally on the plaintiffs, as to the mode of calculation. The plaintiffs promptly corrected what they conceived to be an error, and if they had even themselves so stated the account in the first instance, it would not have deprived them of the advantage of the proper legal way of adjusting it, at any time before a final settlement; and as the defendants when they made the payments did not stipulate for any peculiar course of application, it remains open to the plaintiffs to appropriate them in any way, as much for their advantage as the law will allow, and it is clear that they may insist on the monies being applied in the first place to the keeping down the interest.

The proper mode, I think, is to calculate the interest upon the debt up to the time of each payment, then to apply the sums paid to the discharge of that interest in the first place, and any surplus that may remain to the discharge of so much principal, and to proceed in like manner through the account, reckoning the interest on the unpaid balance of principal between each payment.

The facts here do not really raise any question upon the law respecting imputation of payments, which sometimes has given rise to much discussion.

None of the monies, it seems, ever actually passed through the hands of Messrs. Baldwin and Wilson; they were remitted direct to England, to the plaintiffs resident there: and all that is shewn is, that learning from the defendants' attorney in this country, that certain payments had been made in that way on days that were specified, Messrs. Baldwin and Wilson, giving credit to that statement, made out and rendered an account founded on the information which they had received.

If in their mode of stating the account they committed an error, and exhibited a result more for the advantage of the debtor than was consistent with truth, still that raised no question of imputing any particular payment to this or that head of the plaintiffs' demand, it only amounted to an error in computation of a certain kind, which like any other palpable error in computation does not conclude the party from receiving what is legal and just.



In a case tried before me not long ago at Kingston, it was objected that the method just such as Messrs. Baldwin and Wilson pursued in making out this account, of charging first the interest upon the whole debt for the whole period, as if no payments had been made, and then allowing interest on each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest, was not the correct way of arriving at the balance.

I had observed this to be a very common way of stating accounts, and it did not strike me that it was clearly inaccurate, but this case has convinced me that it is so.

The effect, as we see it in this instance, shews in a strong light that it may in some cases, when the debt has been large and of long standing, lead to results very seriously unjust as regards the creditor, for it is plain that it makes here a difference of several hundred pounds, according as the debt is stated one way or the other.

The error consists in this: the plaintiffs' attornies, as they stated the account, first charged interest on the whole debt from the day the money was lent, (1st January, 1820,) to the 1st January, 1847, amounting to 1579*l.* 10*s.*, and they added that to the principal as if nothing had ever been paid; then they seem to have felt it to be just, as a consequence, that they should allow to the debtor interest upon every payment which he had made in the meantime, from the day of payment to the 1st of January, 1847, and by doing so and deducting the payments and interest from the debt and interest, they made out that only 111*l.* 7*s.* 10*d.* was due. But this is clearly giving the debtor an advantage to which he has no right whatever, inasmuch as besides allowing him interest upon all that he has paid in reduction of the principal, which is simply his due, in order that such interest may be set off against the interest upon such portions of the principal, which for convenience of calculation had all been reckoned against him in the first place as if nothing had been paid, it allows him interest upon large sums which during the twenty-seven years he had been paying on account of interest, and upon which no interest had been reckoned against him, the computation of interest on the other side having been confined to the principal sum. For instance when he made his first payment in August, 1828, of 400*l.*, there was more interest due than amounted to that sum, and so that payment simply had the effect of discharging so much interest which was already due, and which neither before nor since had drawn interest; it paid off none of the money on which the debtor was afterwards charged with interest in the account, and so there was no pretence for allowing interest to run upon it.

It is obvious upon reflection, and I wonder I did not see it when brought to my attention by Mr. Kirkpatrick in another case which I have alluded to, and when it made only the difference of a few shillings or pounds; I believe nevertheless, that the mode adopted by Messrs. Baldwin and Wilson is often adopted and submitted to, and where the periods are not long, and large sums have not been paid for interest, it does not much signify; but in this case the interest on the 400*l.* for nearly twenty years amounts to 440*l.*, and goes in fact to discharge so much of the debt, though the defendant did nothing more than merely pay the interest that he ought to have paid as it accrued, and had no pretence to receive

interest on that payment, because it had not been the foundation of any calculation of interest against him on the other side of the account.

In a year or two more, by the mere effect of allowing to the debtor interest upon sums that he had paid for interest, the scale would have been turned against the creditor, and in ten years time, if the calculation on the same principle were carried on, the creditor would owe the debtor nearly half as much as he had lent him, without any new payment being made in the meantime.

MACAULAY, J.—The payment having been made generally without express appropriation by the mortgagor, it was competent to the mortgagee to apply the same in reduction of the arrears of interest, before any part thereof was applied to reduce the principal; indeed it seems the regular mode of making the account, when there are no periodical accounts, to place the payments against the arrears of interest till paid off, and the balance in liquidation of the principal.—See 8 Mod. 242; 2 Freeman, 261; Finch's Rep. 89; 2 Powell on Mortgages, 944, note.

JONES, J., concurred.

*Per Cur.*—Rule made absolute.

---

DOE DEM. EBERTS AND WIFE V. WILSON.

By the operation of the Registry Act, 35 Geo. III., ch. 5, sec. 2, the devisee claiming under a will *made abroad*, and where there has been no "inevitable difficulty" in the way of registering, is not allowed a period of six months within which to register the will; so that if the heir to the testator conveys for value, and his grantee registers at any time prior to the registry of such a will, the title is lost to the devisee.

*Quære.*—As to the effect of the act 35 Geo. III., ch. 5, in registering the wills of persons *dying abroad*.

By the recent Act 9 Vic., ch. 34, sec. 2, all devisees, *without exception* as to the will being made abroad or the testator dying abroad, are allowed twelve months within which to register the will.

Ejectment for land in Harwich.

The plaintiff claimed an interest in the premises, under a will made by John Meldrum in 1829, devising his lands to Mrs. Eberts, one of the lessors of the plaintiff.

The defendant claimed under a conveyance made to one McKnight, by the heir at law of John Meldrum, in 1837.

It was a registered title before the will was made, and the will was unregistered.

The defendant contended that he was in consequence entitled to hold under the subsequent conveyance made by the heir to McKnight as a *bonâ fide* purchaser for value.

The will was made abroad, in the state of Michigan, and the lessors of the plaintiff contend, that on that account it does not come under the clause of the Registry Act 35 Geo. III., ch. 5, respecting wills.

This was the only question in the case. The will was produced at the trial, by a Judge of Probate of the State of Michigan.

*Cameron, Sol. Gen.*, for the plaintiffs.

*Harrison, Q. C.*, for the defendant.

The argument of counsel fully appears in the judgment of the court, delivered by the Chief Justice.

ROBINSON, C. J., delivered the judgment of the court.

The deed from the heir at law to one McKnight bears strong marks on the face of it, of not being upon that kind of *bonâ fide* sale to a purchaser which the Registry Act was meant to protect, for it professes to convey all the heir's right in an immense quantity of land specified, "including mortgages, and all other real estate which the grantor may have "as heir at law of his late father."

The consideration is stated to have been 500*l.*, which can have been nothing near the value; the heir makes his mark to this deed.

Then McKnight, not long afterwards, makes a similar conveyance of the lands specified and of all other real estate which Meldrum could claim as heir, to one Cowan for 500*l.*, and in 1841 Cowan makes a deed of bargain and sale in the common form of this particular lot to the defendant for 250*l.*; but on the argument last term nothing was rested on the question of Wilson being or not being a *bonâ fide* purchaser for value, from and under the heir at law, and as such entitled to be preferred to the devisee claiming under an unregistered will, by virtue of the Registry Act 35 Geo. III., ch. 5, sec. 2.

In regard to the only question before us for decision, we had occasion to consider the effect of the clause of the Registry Act respecting wills, in a case of McLeod v. Truax in this court in Hilary Term, 1837, and we there noticed that the English Registry Acts, upon which ours was in the main framed, make exceptions which our act omits, in respect to the wills of persons dying abroad.

The statute 7 Anne, ch. 20, sec. 8 allows three years in such cases for registering the will, the time in other cases being limited to six months; so also the statute 8 Geo. II, ch. 6, sec. 15, 16 and 17, contains a similar provision, but with some modifications.

Our statute 35 Geo. III., (by which, though it is now repealed, this question must be governed,) makes no such express provision for the case of testators dying abroad, nor alludes to the case of wills made abroad.

We are left therefore to consider, whether the will being made abroad (which is all that appears here,) constitutes such a case of "inevitable difficulty, without the neglect or default of the devisee," as can under the 15th sec. of that statute afford a protection to the devisee in case of non-registry, or prolong the time for registering.

If by reason of the testator's dying abroad or the will being made abroad and continuing deposited abroad, it had not come to the knowledge of the devisee till a certain time, then on that fact being shewn (though our act does not like the English acts provide expressly for wills concealed or suppressed,) the case might be reasonably held to come under the condition of "inevitable difficulty," but we have no ground for inferring anything of the kind. The State of Michigan is in sight of the district in which these lands lie.

When the testator died does not appear, or where the will was at the time of his death, and as the devisee did procure the will for the purpose of this trial, it might for all that appears have been as well procured for the purpose of registration.

It would be a violent construction, which should hold the mere fact of a will being made anywhere out of the province to create an inevitable difficulty in the way of registering it, when the British Parliament by



their acts suffer the provisions to apply as well to them as to other wills after the lapse of three years, and when there would in fact be generally less inconvenience in effecting the registry of a will made in Michigan, than of one made in a remote part of this province.

The evidence does not shew precisely what time had elapsed between the testator's death in this case, and the making of the deed by the heir at law, but I infer that there must have been an interval of more than three years.

If so, we should be holding that impossible to be done, which the British Registry Acts compel all persons to do at their peril.

But then a new question is started here, which grows out of the peculiar language of the 15th clause of our statute. Whoever framed that act must certainly have had before him at the time the English Act 7 Anne, ch. 20, for in the 15th clause of our statute, the 7th clause of that act is followed *verbatim et literatim*, except where the framer of our act, for some reason not easy to understand, must deliberately have intended to depart from it.

The English clause runs thus, "Provided also, that all memorials of wills that shall be registered in manner as aforesaid, within the space of six months after the death of every respective *devisor* or *testatrix* dying within the kingdom of Great Britain, or within the space of three years after the death of every respective *devisor* or *testatrix* dying upon the sea or in any parts beyond the sea, shall be as valid and effectual against subsequent purchasers as if the same had been registered immediately after the death of such respective *devisor* or *testatrix*, anything herein contained to the contrary hereof in anywise notwithstanding."

Our clause is in these words, "Provided always that all memorials of wills that shall be registered in manner as aforesaid, within the space of six months after the death of every respective *devisor* or *testatrix* dying within this province, shall be as valid and effectual against subsequent purchasers as if the same had been registered immediately after the death of such respective *devisor* or *testatrix*, anything herein contained to the contrary in anywise notwithstanding."

We see at once where they differ; the legislature of this province has omitted to take any notice of the case of *devisors dying abroad*.

The omission could hardly have been accidental; but what is to be the effect of it? That in such cases the will may be registered at any time, argues one party, for the legislature could not have meant to have made the act more stringent on absentees than on persons living within the province; and it is clear that the devisees under such wills are safe and in time if they register within six months, while it is equally clear that the case of *devisors* dying out of the province cannot by any possible construction be brought within the clause which gives the privilege of six months.

If this be so, argues the other party, then it must follow that those claiming under such wills have no grace at all allowed to them, because the second clause is general and indiscriminate and applies to all wills, placing them all within the same danger of being defeated by subsequent conveyances which may be registered before the will, and if we cannot so extend the act in the 15th clause as to give six months time to the case of persons dying out of the province, because it is in terms conferred

only in the case of devisors dying within the province, neither can we so narrow the act in its second clause as to make the protection to purchasers apply only as against wills of devisors dying within the province, when the words are as clear as possible and embrace all wills without exception.

I see no way to any sensible conclusion but this, namely, that as the legislature have first placed all devisees under the peril of being cut out by the prior registration of a deed made subsequently by the heir at law, and have relieved only from this peril a certain class of devisees, and that only to a certain extent, namely, devisees claiming under a devisor who had died within this province, we must apply the act as it stands and without that relaxation in the case of all other devisees, for we can not repair the omission of the legislature in so plain a case without legislating, which we have no authority to do.

The language of Grose, J., in the case of *Plaskett v. Beeby et al.*, 4 E. R. 491, applies strongly here in principle. It was contended there that an infant devisee, sued under the statute 3 W. & M., ch. 14, for a specialty debt of his ancestor, must be allowed to pray that the parol shall demur by reason of the nonage, as in the case of an infant heir; but Grose, J., said "the observation made on the general provision of "the statute is very material. The legislature have in the first instance "evidently made the real estate of the testator liable in the hands of the "devisee to specialty contracts, and where they meant any exception they "have introduced it in other parts of the act; then if they had meant "to ingraft also the qualification now contended for, they would have done "so, but that being omitted we cannot supply it."

In like manner here the legislature has in the first place required of all devisees to register, under peril of having their title defeated, and if they had stopped there, then devisees not registering must in all cases have stood under the risk of being cut out by the registry of a deed made subsequently by the heir. But the legislature has given a privilege of six months in the case of devisees dying within the province, and only in those cases, and we have no authority to say that not only those cases, but all others, are to have the benefit of that privilege.

Indeed, if we could, it would not serve the plaintiffs in this case, for they have not availed themselves of the privilege by registering within the six months, still less can we say that because the legislature has granted the six months' time to devisees in certain cases only and not in others, therefore in all other cases the devisees shall be safe without registering at all.

It is not material to refer to the recent Registry Act 9 Vic., ch. 34, because it is the former statute which must govern the decision of this question.

I will only observe therefore, that by the 12th sec. of this last act the legislature allows twelve months, instead of six, given by the former law, and allows it in all cases, without distinction between the cases of devisors dying out of the province and others; the plain effect of which provision, I take it, must be, that in cases after this act, a devisee under the will of a testator dying abroad must register within twelve months at his peril.

The devisee in the case before us had a much longer time in fact, within which she would have been safe if she had registered her deed,

and if she loses her estate by omitting to register, her case will not be so hard as the case of any devisee would be under the now existing law. If a case should arise under the former statute, in which a devisee, under a will made by a person who died abroad, has registered within six months, but not till after the registration of a subsequent deed from the heir at law to a purchaser, then we should have to determine whether we could by equitable construction give the benefit of the six months in such a case. I have intimated that I apprehend we could not, but that is not the question which we have now to decide, and it would be well if before any such case occurs, the legislature would consider the propriety of explaining what was intended by the statute of 1795, in regard to the registry of wills of persons not dying within the province, for certainly the matter is not left upon a reasonable and satisfactory footing as it stands.

I have considered the circumstance, that the legislature by their stat. 58 Geo. III., ch. 8, first provided a method of proving for registry wills which have been made out of the province, but confined their provision to wills made within the British dominions, leaving wills made in foreign countries without any convenient method of proof.

We cannot infer from this, that the latter class of wills were not intended by the legislature to be registered, for then the Registry Act would have been a most imperfect and delusive security, and we might as well have inferred that until the 58 Geo. III., was passed, wills made in the British dominions but out of Canada were not required to be registered.

The late act besides in terms extends the same convenient method of proof to wills executed in what are properly foreign countries, which shews that the legislature conceived and intended that the law should extend in its general provisions to all wills alike.

For these reasons I think the plaintiffs' case fails by reason of the non-registry of the will, and that the defendant is entitled to the postea.

*Per Cur.*—Postea to defendant.

#### DOE DEM. JARVIS V. MARGERY CUMMING.

*Held, per Cur.*, upon the following will, devising certain land to the testator's wife for life, "and after her decease, then unto her son William Cumming, his heirs and assigns, for ever, provided that the said William Cumming will pay all such demands as may be against the said William Cumming, by his having signed any promissory note or notes with his said son William, or any other sum or sums of money that he might be owing on account of his said son William; and if his said son William should make default in paying all such demands as aforesaid, or if any part thereof should be collected from any devizee in this said will mentioned, then and in that case he devised the said land unto his daughter Margery, her heirs and assigns, for ever"—that William Cumming the son took a vested estate in remainder, with a conditional limitation over to his sister in case of a certain event happening; and that such estate of William could be sold at sheriff's sale, under the 5th Geo. II. ch. 7, during the life time of his mother.

Ejectment for west half of Lot No. 3 in 3rd concession of Cornwall.

This land belonged to William Cumming, who made his will in 1824, devising to his wife for life, "and after her decease, then unto his son "William Cumming, his heirs and assigns for ever, provided that the



"said William Cumming will pay all such demands as may be against the said William Cumming, by his having signed any promissory note or notes with his said son William, or any other sum or sums of money that he might be owing on account of his said son William, and if his said son William should make default in paying all such demands as aforesaid, or if any part thereof should be collected from any devisee in this said will mentioned, then and in that case, he devised the said land unto his daughter Margery, her heirs and assigns for ever."

After the testator died, several judgments were obtained in the district court against William Cumming the devisee in the will, and the lessor of the plaintiff claimed as purchaser at sheriff's sale made under writs of *fiery facias* on those judgments, which sale was made while the widow, who is now dead, was living and in possession of the premises devised to her for her life.

The cause was tried upon written admissions made by the parties.

No evidence whatever was given that William Cumming the son had paid any debt of the description mentioned in the will, at any time, nor was it shewn that there are or ever were any such debts to be paid.

It was objected at the trial, that during the widow's life, at all events, William Cumming had no legal interest in the land that could be sold in execution, and secondly, that it was not shewn that he had performed the conditions on which alone the estate was to vest.

A verdict was taken for the plaintiff, with leave reserved to move the court to enter a nonsuit.

*P. M. VanKoughnet*, for the lessor of the plaintiff, referred to 3 T. R. 88; 3 T. R. 489, note; Jarman on Wills, vol. 1, 706, 726; 1 P. Wm. 505; 5 Ves. 207; 2 Blackstone's Com. 17; Gilb. Exon, 38; Tidd's Prac. 1075.

*J. Lukin Robinson*, for the defendant, referred to Bacon Ab. Con. B.; Shep. Touch. 135; 2 Saund. 388; 1 Vent. 199; 1 Fearn, Con. Rem. 409; 2 Mod. 7; 1 Mod. 86, 300; 3 T. R. 88; Jarman on Wills, vol. 1.

ROBINSON, C. J., delivered the judgment of the court.

The only question submitted to the court is, whether at the time of the sheriff's sale the debtor had such an estate or interest in the land as could be taken in execution under the British statute 5 Geo. II., ch. 7.

It appeared to me at the trial, that the paying any debts &c. was a condition precedent to the estate vesting, and that as it could not be known while the widow lived, what might be the state of things in that respect at the time of her death, that William Cumming could not therefore be seised of an estate in the land during her life, but I now conceive the effect of the will to be, that it creates a conditional limitation in favour of the daughter Margery, who would take the fee if William the devisee should make default in paying any such monies as the will refers to.

William Cumming took the remainder in fee, subject to that conditional limitation over to his sister, and in the meantime, and while his mother the tenant for life lived, he had in my opinion an interest in the land, that was defeasible in case there should be demands which he should fail in paying.

The proviso in the will could not have the effect of preventing the

remainder from vesting, so long as any demand could possibly arise against the estate, such as it was intended he should discharge, for it would be impossible then to tell where the fee was to vest.

The reasonable construction to put upon the testator's direction is, that his son William should enjoy the land after the death of his mother, subject to the condition that he must save the estate and the other devisees harmless by reason of any debts which the testator should have contracted on his account.

There was no certainty that there were or would be any such demands, nothing is shewn or admitted of the existence of any debt of the kind; the devisee, if he were the plaintiff in this action, could not prove the negative, viz., that there were no demands and never would be any, in respect to which he had been or could ever be *in default*, (though the fact might be so,) and therefore of necessity we must in the meantime recognize him as being seised of the remainder, and continuing seised till that is shewn which would under the will occasion the remainder to vest in the sister.

Nothing was proved which can entitle us to say that the remainder did not vest by reason of a default, for no default appears or is even surmised, and the devisee could not in the first instance be called upon to give evidence of *no default*, as a condition precedent to the estate vesting, because there is nothing specific to which his evidence could be applied.

If a certain specified debt were to be discharged, or a sum of money to be paid to any one as a condition precedent to the estate vesting, then there would be reason in holding that he must shew that to have been done, but this case is different.

Then is there a doubt that the kind of interest which he seems to me to have had, that is a vested estate in remainder with a conditional limitation over to his sister in case of a certain event happening, is such an interest as may be sold under 5 Geo. II., ch. 7, sec. 4, to satisfy debts?

There cannot in my opinion be any question on that point.

His interest during the life of the tenant for life is a legal interest clearly. Under the statute of wills, which enables persons having any manors, lands, &c., to devise the same, the courts have always held that persons having any *interest in lands* may devise such interest, (3 T. R. 93) and upon the same principle it seems to me, that the interest in this case must be admitted to be assets for the satisfaction of debts, under the words "houses, lands, hereditaments and other real estates," used in the statute 5 Geo. II., ch. 7, and liable to be sold in execution during the continuance of the precedent estate for life, for that was an actual legal interest, not a bare possibility or hope of succession.

I refer upon the first point in this case to Fearne on Contingent Remainders, 409; Bac. Abr. condition H.; Shepherd's Touchstone, "Condition;" Cogan v. Cogan, Cro. Eliz. 360; Fry and Wife v. Porter, 1 Mod. 300; 1 Powell on Devisees, 193.

My brothers are of the same opinion that a verdict be entered for the plaintiff.

*Per Cur.*—*Postea* to the plaintiff.

## PRACTICE COURT.

HILARY TERM, 11 VICTORIA.

---

 Before the HON. MR. JUSTICE McLEAN.
 

---

OGILVIE ET AL. V. KELLY.

In an affidavit to hold the defendant to bail "for goods sold and delivered by the plaintiffs to the defendant," it is not necessary to state that such goods were sold and delivered *at the defendant's request*.

*Semble*, that *the request* must be stated in an action for money paid.

*Semble*, that it need *not* be stated in an action for money lent.

Motion to set aside *cu. re.* and arrest thereon, for defect in the affidavit to hold to bail.

The affidavit made by the plaintiff's agent was for money due to the plaintiffs, "for goods sold and delivered by the plaintiffs to the defendant," without stating that such goods were sold and delivered *at the defendant's request*; and this omission the defendant's counsel objected to as a fatal defect in the affidavit.

McLEAN, J.—Where goods are *sold* and *delivered* by one person to another, the law implies a promise on the part of the purchaser to pay for them, and there is always in such a case a good consideration for the promise; but where a request is necessary to raise a promise, a request must be stated and proved.

It is usual in affidavits and declarations for goods sold and delivered to state that they were sold and delivered to the defendant at his request, but it is not necessary on a trial to prove any request; and it seems to be quite immaterial at whose request they were sold.

Where money is paid by an individual for the use of another, it must be stated to have been paid by request, because the law will not raise a promise to repay such money, as it is not in the power of one man to make another his debtor without his consent. The cases of *Eyre v. Hulton*, 5 Taunt. 704, and *Bury v. Fernandes*, 1 Bing. 338, decided that even for money paid to the use of another it was not necessary to allege a request; but later cases seem to establish, and I think correctly establish, that in such cases a request must be alleged and proved.—3 Dowl. 442; 5 M. & S. 446; 2 Tyr. 161; 8 B. & C. 654.

Where, however, an action is brought for money lent, it is not necessary to state that it was lent *at the request of the defendant*, the law in such a case raising an implied promise of repayment. In the case of *Victors v. Davis*, 12 M. & W. 758, this point was decided, and in giving judgment the court observed, "There cannot be a claim for money lent unless there be a loan, and a loan imports an obligation to pay. If the money is accepted, it is immaterial whether or not it was asked for. The same doctrine will not apply to *money paid*, because no man can be a debtor for money paid, unless it was paid at his request."



It appears to me that money lent and goods sold and delivered stand precisely on the same footing. As in the one case there can be no money lent unless there is a borrower, so in the other no goods can be sold and delivered unless there is a purchaser; and in both cases the consideration will support an implied promise, whether the request be on the one side or the other. In the Digest of Cases in this Court, page 10, I find a case of *Watkins et al. v. Liebshitz*, in which it is stated the court decided that "An affidavit for goods sold and delivered must shew the request of defendant, and the request being laid to other sums will not supply the defect." This case appears to have been so decided in Hilary Term, 7th Will. IV., but unfortunately I am unable to find the report of it, so that I have been unable to see the grounds of the decision. I regret this particularly, because I should be unwilling to appear to overrule a well considered judgment of the court, and thus introduce an uncertainty on a point which otherwise might be considered established. As, however, the report of it cannot from some accident be found, I am obliged to form my judgment from analagous cases which are reported; and these have led me to the conclusion, that in an affidavit like that in the present case, it is not necessary to allege a request of the defendant to buy the goods, but that such request must be implied from the words "sold and delivered by the plaintiff to the defendant."

Rule discharged with costs.

---

RICHARD McDONNELL v. ANN KELLY.

In an affidavit to hold to bail, for goods sold and delivered, it must be shewn that the goods were sold and delivered *by the plaintiff to the defendant*.

Motion to set aside *ca. re.* and arrest thereon, for irregularity and defect in the affidavit of plaintiff.

The defect complained of in this case was the same as in the case of *Ogilvie et al. v. Kelly*, that no request on the part of the defendant was stated; and also that it was not stated that the cord-wood, for the amount of which the arrest is made, was sold and delivered *by the plaintiff to the defendant*.

McLEAN, J.—The affidavit does not state by whom the cord-wood was sold and delivered; so that, for aught that appears, the plaintiff may be proceeding for an amount due for cord-wood delivered by somebody else, the value of which the defendant may have assumed to pay to him.

The cases of *Perks v. Stevens*, 7 E. 194; *Taylor v. Forbes*, 11 E. 315; *Fenton v. Ellis*, 6 Taunt. 192; and *Hyde v. Jacobs*, in the Common Pleas, Hilary Term, 1815, shew that it is necessary in an affidavit to state that goods have been sold and delivered by the plaintiff to the defendant; and where it has been omitted to state that they were sold *by the plaintiff*, or that they were sold *to the defendant*, the affidavit has been held insufficient.

In the case of *Eyre v. Hulton*, 5 Taunt. 704, Chief Justice Gibbs, in reference to the case of *Perks v. Stevens*, 7 E. 194, where an affidavit, that defendant was indebted to the plaintiff for goods sold and delivered without adding that they were sold to the defendant, was held insufficient, remarks, "In that case it did not appear to whom the goods were sold. It might be a sale to defendant, or to another, for whose debt

"he had made himself responsible. Therefore the nature of the debt did not sufficiently appear. *If it had been said that the goods were sold by the plaintiff to the defendant, that would have been sufficient.*"

On the authority of these cases, the rule to set aside the *ca. re.* and arrest in this case must be made absolute, the defendant entering a common appearance and undertaking to bring no action.

---

JOHN PATTERSON V. HENRY ATTRILL AND WILLIAM ROSS.

The notice endorsed upon the copy of a writ of *ca. re.* requiring the defendant to appear on a certain day, must contain in the mention of the day and month, the *correct return day* of the writ.

*Semble*, that proceedings are stayed from the time of the making of the rule to stay proceedings, and not from the service of the rule.

Motion to set aside service of copy of *ca. re.* on defendant Ross, for defect in the notice endorsed thereon, pursuant to the statute, for the appearance of defendants—the notice requiring defendants to appear on the 26th of June, instead of 26th July, the return day of the writ.

The writ was tested on the 26th June, the last day of Easter Term, and was returnable on the first day of Trinity Term, which was on the 26th July; but the notice to the defendants endorsed on the copy served on William Ross was to appear on the same day the writ was tested.

McLEAN, J.—The statute 2 Geo. IV. ch. 1, sec. 4, requires the notice in question to be endorsed on every copy of non-bailable process, and the intention of it is, that defendants may be made aware of the period at which it is necessary for them to appear: the day is most important, as persons not conversant in such matters can scarcely be supposed to be aware of the particular days on which the terms of this court commence or end. The insertion of a wrong day is therefore calculated to mislead, and at all events cannot afford that information which the statute requires.

It is objected on this occasion, that notice of this application was not given till the rule was served on the 2nd August, on the agent of plaintiff's attorney in Toronto, and that common bail was filed at Kingston before the plaintiff's attorney could be informed of it. The rule was taken out on the 31st July, Saturday, and served on the Monday following, 2d August, and on the following day common bail was entered at Kingston.

The service on the agent here must be considered the same as if the service were on the principal, and the rule contains a stay of proceedings in the meantime. The entry of common bail therefore, after such stay of proceedings, was irregular, and cannot operate as a reason why this application shall not be granted. Had it been entered before the service of the rule, the objection would have been stronger; but even then, from the time of the making of the rule to stay proceedings it must take effect, and anything done in the cause till the rule was disposed of must have been irregular.

The rule must be made absolute for setting aside the service on W. Ross.

*Per Cur.*—Rule absolute.

THE BANK OF UPPER CANADA V. JAMES MACFARLANE AND OTHERS.  
THE SAME V. THE SAME.

Where a levy is made by the sheriff under a writ of *feri facias*, and he returns goods on hand for want of buyers, and a writ of *venditioni exponas* is then sent to the sheriff, that writ will always be an authority to the sheriff to sell, though the *return day* be passed.

*Semble*, that when a sheriff, under these circumstances, returns to the writ of *ven. ex.* "that he is unable to sell," he may be liable to an action for a false return, but he cannot be attached.

*Semble also*, that when the sheriff returns a writ before the attachment issues, but not within the time limited by the rule, he can only be relieved upon payment of costs.

Motion to set aside attachment issued against the Sheriff of the Midland District, for not returning writs of *venditioni exponas* in these cases pursuant to rule.

It appeared by the affidavits and papers filed, that on the 10th of June a summons was obtained from a judge in chambers, calling on the sheriff to shew cause why an attachment should not issue against him, returnable the 3rd day of July, for not returning the writ of *venditioni exponas* issued in this cause; which summons was served on the sheriff at Kingston on the 12th of June. That on the 14th of June, Mr. Campbell, as counsel for the sheriff, wrote to his agent to shew cause against granting the attachment; but that, owing to adverse or severe weather, the steamer by which the mail was sent containing the letter did not arrive in Toronto till the 16th of June, on which day the attachment was taken out, though Mr. Campbell's agent immediately on the receipt of his letter applied to the agent of plaintiff's attorney to delay proceedings in the matter.

The writs of *venditioni exponas* had been returned to the crown office by the sheriff, and filed there on the 12th, the same day the summons was served on him at Kingston. Though the writs were returned and filed on the 12th, the attachment was taken out on the 16th for not returning them; and the reason assigned was, that the return attached to the writs was insufficient.

The return and the affidavits filed shewed that after the writs were placed in the sheriff's hands they were withdrawn by the plaintiffs' attorney, who directed the sheriff to do nothing in the matter, and they were retained by him till long after the return day, under an idea that a bill drawn by Mr. C. Stewart on Acheson (the party owing the amount), would be met by him, and the whole thus settled; that the costs were charged by the sheriff to plaintiff's attorney with his knowledge, but that he afterwards objected to pay them, alleging that it was uncertain whether the bill would be paid or not. That the writs were subsequently placed in the sheriff's hands by the plaintiffs' attorney, with instructions to proceed upon them, but that the sheriff declined doing so, the return day having long past, and the sheriff considering that his authority to act on the writs was thereby ended.

The writs had been received by the sheriff on the 13th Feb., 1846, and immediately withdrawn by the plaintiffs' attorney; and from that time till about the 22nd September following the sheriff was prevented



from acting, in consequence of the writs being so withdrawn, a period of upwards of eight months.

McLEAN, J.—The very long delay which had occurred might very well justify the sheriff in believing (more especially if he was aware of other arrangements in reference to the amount) that the proceedings on the writs of *venditioni exponas* had been abandoned by the plaintiffs.—Still, when the writs were replaced in his hands, it appears to me that he had a right to act upon them, and ought to have done so when required.

The levy having been made under writs of *fi. fa.*, and the goods remaining in the sheriff's hands unsold for want of buyers, the object of the *ven. ex.* was to enforce a sale, and to justify the sheriff in selling for any price that could be obtained.

The writ would always be an authority for that purpose, though the return day might be passed; the only effect of the return day being past must be, that the money could not be produced at the time required by the writ; but the authority to sell could not be affected by that circumstance, any more than in a case where a levy has been made before the return day of a *fi. fa.* and the sale made afterwards, but before the actual return of the writ.

After stating the particular circumstances, the sheriff in his return alleges, that by reason of these circumstances he was "unable to sell the goods and chattels of the defendants under the writs, as therein he was commanded."

If that return be false he is liable, as it appears to me, to an action for it; but I do not think he ought to be attached under the particular circumstances of the case, the writs having been actually returned before the attachment issued. As however they were not returned within the time limited by the rule served upon him, the sheriff was in fact in contempt at the time the attachment issued, and he can only be relieved on payment of costs.

I should recommend that leave should be obtained on the part of the sheriff to withdraw the writs of *venditioni exponas* and the returns upon them, or that alias writs should be issued, so as to enable the sheriff to sell the goods and thus prevent the necessity of other proceedings.

*Per Cur.*—Let the sheriff be relieved from the attachment on payment of costs.

QUEEN'S BENCH.

MICHAELMAS TERM, 1847.

---

Present,—THE HON. J. B. ROBINSON, C. J.

THE HON. MR. JUSTICE MACAULAY.

THE HON. MR. JUSTICE JONES.

THE HON. MR. JUSTICE MCLEAN.

THE HON. MR. JUSTICE DRAPER in the Practice Court.

---

DOE DEM. MARR V. WATSON.

A., on the 14th of August, 1844, demises certain land to B. and C. for a year from the 1st of January, 1845; A. afterwards, on the 23rd of August, 1844, conveys in fee the land to D., taking back on the same day a mortgage to secure the payment of the purchase money on a certain day, the mortgagor to remain in possession till default. On the 1st of December, 1845, B., one of the lessees, let E. into possession for a month, bringing the time up to the end of the term for which A. had demised to B. and C.—E. refused to go out at the end of the month, upon which D. brought ejectment. *Held, per Cur.*, that E. was not estopped, as tenant of the assignee of A., from shewing that the title the assignee had once held, and that but for a moment, had ceased, by reason of his mortgage back to A., under which A., and not D., since the default made, was entitled to the possession—and that judgment should be entered for the defendant.

Ejectment for land in Pickering, not particularly described.

Verdict for the plaintiff subject to the opinion of the court.

One Demorest, on the 14th of August, 1844, demised the north half of No. 35, in the 7th concession of Pickering, to Jonas and Abraham Lott, to hold for a year from the 1st of January, 1845.

On the 23rd of August, 1844, he conveyed in fee the *westerly* part of the same lot, embracing part of the *north half*, to the lessor of the plaintiff, taking back on the same day a mortgage to secure the payment of the purchase money on a certain day, the mortgagor to remain in possession till default.

On the 1st of December, 1845, Jonas Lott, one of the lessees, let the defendant into possession for a month, which would bring the time up to the end of the term for which Demorest had demised, and the defendant not going out then, the plaintiff brought this ejectment.

The defendant set up the title of mortgagee, the mortgagor having made default by not paying at the day.

ROBINSON, C. J., delivered the judgment of the court.

I am of opinion that the plaintiff could not recover upon this evidence, for that the defendant was not estopped, as tenant of the assignee of Demorest, from shewing that the title the assignee had once held, and that but for a moment, had ceased by reason of his mortgage back to Demorest from whom he had purchased, under which mortgage Demorest, and not Marr since the default made, is entitled to the possession.

In general a tenant is not estopped from shewing, that since his landlord demised to him he has parted with the estate, and is therefore no longer entitled to possession; there is no inconsistency in his doing so, because that involves no denial of his landlord's right to make the lease under which the tenant went into possession.

Here the case is stronger, because the tenant (if we look on Watson as standing on the same ground as his original lessees,) is not resisting an action by the lessor, he is only in fact setting up his lessor's title against a person who claims to have purchased from him since the lease was made.—Adams on Ejectment, 33.

*Per Cur.—Postea* to defendant.

---

### DUNNING V. GORDON.

Upon an agreement between A. and B. "that certain timber should be marked for B. as made, and should be delivered as fast as made to *his agent*, and should be to all intents and purposes his property, to be held in security for his advances:" *Held per Cur.*, that the timber having been all made for B. and marked for him—part of it delivered, and all brought out of the woods and taken possession of by B. and sold to C., who had actual possession for many weeks with the knowledge and apparent consent of A.—that such timber could not afterwards be seized by the sheriff as the property of A. merely because B. had not sent out an agent to receive the whole of it in the woods.

This was an issue under the Interpleader Act, to try whether certain goods seized upon a *fi. fa.* against the goods of Alexander Fergusson and others, were or were not the goods of Alexander Fergusson.

The jury found for the plaintiff, damages one shilling, thereby determining that the goods were not the goods of Alexander Fergusson liable to the execution.

The precise issue on the record was, "whether the timber at the time "of the seizure thereof by the Sheriff of the Ottawa District, was the "goods and chattels of the said Alexander Fergusson, and liable to be "taken under the writ of execution to satisfy the same?"

The court was moved on the part of the plaintiff to direct a verdict to be entered for the plaintiff for all the timber seized by the sheriff under the *fi. fa.*, leave having been reserved to direct the verdict to be so entered, if it should appear to be in accordance with the evidence.

It seemed that as to part of the timber, ninety-three pieces, the jury were satisfied that Fergusson, who had made the timber on a contract with one Wilson, had delivered that portion over to Wilson's agent according to the contract; and so far as that portion of the goods is considered, the plaintiffs claim to have it exempt from the operation of the *fi. fa.* afterwards coming at Gordon's suit against Fergusson, would be free from doubt; but as to the residue of the timber, which formed the greater part, it was left to the court to determine whether the evidence did shew such a delivery as vested the property in Wilson before the *fi. fa.* came against Fergusson; and if so, then the verdict should go for the plaintiff for that part also, Dunning claiming as a purchaser from Wilson.

*H. Eccles*, for the sheriff, cited Watson on Sheriffs, 273.

*J. H. Hagarty*, for the plaintiff, referred to 6 C. & P. 144.



ROBINSON, C. J., delivered the judgment of the court.

It was stated in the argument, that unless it should appear that all the timber seized under the *fi. fa.* belonged to the plaintiff, the verdict must be for the defendant; and *Morewood v. Wilkes et al.*, 6 Car. & P. 144, was cited as a decision to that effect; but there the issue to be tried was, whether "*the said goods* (that is, all of them) were not the "property of the plaintiff." Here the issue is, whether they were not the goods of Fergusson, the defendant in the *fi. fa.*, and unless they all were, the plaintiff would be entitled to succeed on that issue; so that it seems plain here that the plaintiff would be entitled to a verdict on account of the ninety-three pieces.

But as to the residue, as I understand the evidence, and as the case is reported by the learned judge who tried the cause, the timber was all made upon an agreement with Wilson, such as the written contract in evidence imports, though a part had been prepared before the writing was actually executed.

I take it to be the fair effect of that agreement, that the timber as it was made and marked by Fergusson with Wilson's name became his, the agreement having stipulated "that it should be marked for him as "made, and should be delivered as fast as made to his agent, and should "be to all intents and purposes his property, to be held in security for "his advances," though it was to be taken to market and sold on account of Fergusson.

Under such circumstances, the timber having been all made for Wilson and marked for him, part of it delivered and all brought out of the woods and taken possession of by Wilson, and sold to this plaintiff, who had actual possession for many weeks with the knowledge and apparent acquiescence of Fergusson, it could not certainly be afterwards seized as the property of Fergusson, merely because Wilson had not sent out an agent to receive the whole of it in the woods. That it should be delivered as fast as it was made and marked, was a condition inserted for Wilson's benefit; but though he may not have found it convenient or thought it necessary to send out his agent to receive every portion that was made, it all became nevertheless his, as security for his advances, as fast as Fergusson made and marked it for him; and Fergusson could not regain possession of it after it had been taken by Wilson or for him, for he had shewn no intention to withhold one part from delivery more than another, but had suffered all to pass out of his own possession, as he ought to have done according to his agreement, when he had once set it aside as Wilson's by the notorious act of marking it with his name. He retained then no right in the timber made upon such a contract, except the right expressed of having an account rendered to him of the proceeds.

The plaintiff was therefore, I think, entitled to a verdict as respects all the timber in dispute.

*Per Cur.*—Postea to the plaintiff.

---

## BELCHER V. COOK.

A special assumpsit to pay in grain, or in any particular manner, or at a *future* time a *continuing debt*, in respect to which the law had raised an implied assumpsit to pay in *money on request*, is a binding promise supported by a good consideration.

MACAULAY, J., dissentiente.

The plaintiff declares "That whereas the defendant heretofore, to wit, on the 29th of December, 1841, by his agreement in writing, bearing date the same day, *for value received by him of the plaintiff*, and in consideration of his being indebted to the plaintiff in 11l. 5s., then and there on the last mentioned day promised to pay the plaintiff or bearer 11l. 5s.; which said amount the defendant then and there agreed with the plaintiff to pay to the plaintiff or bearer in carpenter work at the going prices, when called for;" and avers a request to do work according to the agreement and refusal.

The defendant pleads, 1st, General issue.

2ndly, "That after *the making of the agreement*, to wit, &c., he at the request of the plaintiff, and *under the same agreement*, did pay and perform for the plaintiff certain carpenter work, which the plaintiff then required the defendant to do in and about the erecting a certain building, to the value of 10l. (and set out particulars), which work the plaintiff accepted from the defendant *in part performance of the agreement*; and that he has always been ready to do work to the remaining amount due, when requested," &c.

3rdly, A similar plea: "that before any *breach of the agreement*, the plaintiff requested the defendant to do certain work specified upon certain terms mentioned, he the defendant agreeing that the 11l. 5s. to be paid in work under this agreement should be allowed on account of such work, which should be in full discharge of the agreement sued on; that he did work in pursuance of this second agreement, and on this understanding, to 10l., and has always been ready to proceed to execute the new agreement, but that the plaintiff has never found materials for the work."

4thly. "That after the making of the agreement sued on, to wit, &c., and before breach—in consideration that the defendant owed the plaintiff the money in the agreement mentioned, payable in work as therein mentioned—it was agreed between the plaintiff and the defendant, that the plaintiff should furnish timber, nails and other necessary materials, to erect and finish a driving shed of certain dimensions, &c., and that the defendant should finish it for 16l. 5s., and should receive 5l. for the work, being the difference between the said 16l. 5s. and the said sum of 11l. 5s. in the first count of the declaration mentioned, and that the agreement in this plea mentioned should be substituted for and be in the place of the agreement in that count mentioned—which latter should be wholly rescinded, and the same agreement thereby became and is wholly rescinded."

The 3rd and 4th pleas were demurred to, and a special replication to the 2nd plea.

*Durand* for the demurrer, cited 7 Jones, 6; 1 U. C. R. 307; 5 M. & W. 289; 13 M. & W. 58; 8 L. J. 292; Arch. N. P. 109; 5 Bing.

N. C. 248; 10 A. & E. 622; 11 A. & E. 1027; 3 P. & D. 656; 10 M. & W. 102; 1 M. & W. 65; 2 C. M. & R. 360; 3 Dowl. 752; 1 C. M. & R. 741; 2 C. M. & R. 408; 2 B. & C. 477; 8 L. J. 160.

*A. Wilson* contra, cited 1 Jurist, 183; Vaughan, 104; 3 Ad. & El. 741; 5 Tyr. 836; 4 M. & W. 123; 10 M. & W. 786; 7 Bing. 266. Upon the objection to the declaration, that no sufficient consideration was alleged for the promise stated, he cited 1 Tyr. 84; 5 M. & W. 242; 1 M. & G. 166; 3 A. & E. 234; 10 Jur. 472.

The arguments of counsel are fully stated in the judgment of the court.

Only so much of the pleas as was necessary for disposing of the question which had been raised in regard to the declaration, is here stated.

ROBINSON, C. J.—It is to be regretted that this small demand should have led to so expensive a litigation. In some cases, when the subject in dispute is apparently very trifling, there may be a legal question of importance affecting future rights, and then, although only a pound or a shilling may be immediately involved in the action, one can see that there is something to be determined, on which the litigants may reasonably have set a high value.

This is a mere claim of one man upon another, and perhaps a poor man, to do work for him under an express contract to the amount only of 11*l.* 5*s.* The sum is but a few shillings above the jurisdiction of the lowest and cheapest tribunal in the country. There was probably some sufficient reason why it was not brought in the next highest, the District Court; and if so, the plaintiff could do no otherwise than forego any remedy or sue here. But still, the parties being unfortunately involved in a litigation about a small sum, and upon a plain demand of this kind, it was most desirable that they should arrive at a decision without unnecessary expense; for otherwise they must soon find themselves in that condition that, let the cause go which way it may, the result can be beneficial to neither.

The demand was one of an ordinary nature—a contract which should be honestly fulfilled according to its plain meaning, whatever legal questions might be ingeniously raised upon it—questions which, in such plain and trifling cases, it is not only not worth while to discuss, but it is mischievous discussing, since the litigation can serve no good end for either party.

Here the declaration shews a plain and meritorious claim: the plea set up what, if it were true, should certainly have been treated by the plaintiff as a conclusive and satisfactory defence; for the defendant Cook, not denying that he had agreed to do work for Belcher at his request to the amount of 11*l.* 5*s.*, set forth that he had done work under the agreement to the amount of 10*l.*, and was ready to do the remainder whenever called upon, which he pleaded he never had been. Now that was either true or not true. If true, it should have made an end of the case; if not true, the plaintiff had only to deny it, and put the defendant to the proof. Instead of that, the parties have become entangled in a mass of pleadings and demurrers, sufficient to satisfy one the moment it is looked upon that neither the plaintiff nor the defendant is likely to be anything the better, whatever may be the decision in the cause.

I do not make these remarks with the view of censuring any person, but in order to call attention to what I feel to have been an unfortunate



course of proceeding in a case of this kind, and one that I hope may, from a due consideration of the nature of such cases, be avoided in others.

Upon the argument of the demurrers to two special pleas, and a demurrer to a replication to another plea, or rather to part of the replication (for there is a demurrer to part and a rejoinder to another part of the same replication), the defendant's counsel has excepted to the declaration as insufficient, and the exception gives rise to some questions which have called for much consideration and research.

The defendant now, upon the argument of the demurrers to his pleas, objects that the plaintiff upon the face of his declaration has no cause of action; because, first, the words "*for value received, and in consideration of the defendant being indebted to the plaintiff*," import nothing but a past consideration, which is insufficient in law to support a promise; and secondly, because the past consideration having raised an implied assumpsit at the time of the transaction, whatever it might be, will not in law be received as a consideration to support any assumpsit inconsistent with that implied assumpsit, such as to pay on a certain day to come, or as in this case to pay in work, or in any commodity other than money. The last proposition is rather the reasoning upon the first objection, than a new objection.

The first question to be disposed of, as it appears to me, is, whether the defendant is now in a situation to urge such objection, or whether his pleas, forming part of the lines of pleading involved in the demurrer, do not preclude him. I consider that they do preclude him. It is stated as a general principle, that pleading over cures objections of form, but not of substance; so that when the defendant either pleads the general issue or any substantial defence going to the merits, he is held to have waived objections of form, such as want of certainty of time and place, &c.; and indeed, the statute of Anne puts an end to any doubts upon that point. But the effect of the plea in obviating objections to which the declaration would on the face of it be liable, goes much further than that, for it has been often held, that a defendant must be taken to have precluded any question being raised, even of the most substantial nature, upon a fact necessary in itself to the maintenance of the plaintiff's action, by his having pleaded a plea which tenders an issue upon some other material point. Many instances of this will be found in the books. I refer to Com. Dig. Pleader, C. 85-87.

In *Hoskin v. Robins*, 2 Saunders, 324, the plaintiff in replevin pleaded to the avowry a cognizance that the tenants in a manor had a right of common by custom in a certain part of the manor, and that they gave license to him to put in his cattle. The defendant pleaded, there was no such custom. And after verdict it was moved in arrest of judgment that there could be no such license as the defendant pleaded except by deed; but the court seemed to be of opinion that such license could not be granted without deed, and held "that after verdict on an issue joined on the custom it was ended, for now it shall be presumed that there was a good license granted by deed, when the defendants have taken issue upon another point; for they thereby admit that the plaintiff had a good and effectual license, provided there was such a custom within the manor as the plaintiff alleges; and it being now found that there

"is such a custom, the court will presume the license to be such a good license as the law requires."

So in *Muscot v. Ballet*, Cro. Jac. 369, after verdict in an action of covenant on *non est factum*, the defendant objected that the plaintiff had not shewn a good breach (which is as necessary to sustain an action on a contract as to shew that a contract in assumpsit was made on a good consideration), *sed non allocatur*; because as the covenant is general so the breach may be—especially as this case is, where the defendant has made the declaration good by pleading *non est factum*, so he allows of the breach if it had been his deed.

In *Bolton v. Smith*, as reported by Lofft, 465, Lord Mansfield is stated to have said, "It is admitted that after verdict consideration will be presumed, either the same as laid or a good one." The case, however, is reported in so strange and rambling a manner, that no reliance can be placed on it; and I take it to be quite clear, that if the declaration in this case had stated no consideration for the defendant's promise, so that it stood as a mere *nudum pactum*, a verdict could not have helped it. *Courtney v. Strong*, 1 Salk. 364, is clear to that point. And the effect would be the same if the plaintiff had set out a consideration clearly bad or insufficient, as in *Adams v. terre-tenants of Savage*, 6 Mod. 136, where the question after verdict was as to the sufficiency of the title which the plaintiff had shewn to sue as administrator, and it was urged that the defendant having pleaded to the merits had cured the objection; but the court say, "When you yourself affirm this title, how can we intend that you have authority, for of your own shewing this is your title, which is manifestly bad? There is a vast difference where a title does not appear fully for the plaintiff, and the party will not controvert with him about that; for then, if the party were not well satisfied with the plaintiff's title, it may be well presumed that he would have insisted upon it in due time; and where the plaintiff himself shews that he has no title, for there the court has no reason for intendment. Where the matter is indifferent to be well or ill, and the party pleads over, the court said they will intend it well." So, I have no doubt, stands the matter in regard to the declaration being cured by verdict.

And when a defendant being sued upon a contract either denies that he made it, or in any other manner resists his liability upon it so that a verdict passes against him as *in invitum*, he can with some reason be allowed to say afterwards, that after all he cannot be legally compelled to perform the contract, either because it is so vague and defective in its terms that no action will lie upon it, or because there is no consideration alleged, or an illegal or insufficient consideration, for all these objections tend to support his defence that he is not liable on the agreement, though he may at first have rested his non-liability on some other ground.

But when a defendant being sued on a contract does not deny that he made it, but admits it, as the defendant in this case has done, and that he was bound to perform it, and rests his defence solely on the plea that he really has performed it, he stands in a very different light before the court. He tenders an issue that affirms the contract, and comes with a bad grace afterwards to deny its sufficiency.

This defendant stands in the same situation in principle as a defendant paying money into court; he admits a cause of action under the special contract; he admits that he made such agreement, and that he is bound by it. He must be supposed to know the facts as respects the consideration, and he is bound to know the law, and having submitted to the contract and performed it for the most part, as he pleads, and professing himself ready to perform the remainder, he cannot raise a question about the consideration, certainly not unless the declaration is conclusive in his favour, not by what it omits to state but by what it does state.

If consistently with what is there stated, there could have been a good consideration, we are to presume that there was such. The consideration as it is here stated is not an illegal one, and it may in my opinion have been a perfectly good one to move to the promise when it was made; the value received may respect money lent or goods sold, or anything that would constitute a debt, and the promise may have followed instantly on the consideration being received that led to it. There is nothing in the declaration that imports otherwise conclusively; it is in the same terms in effect as the common counts in *indebitatus assumpsit* except that these commonly lay the promise on the same day as the *indebitatus*, though they lay it *afterwards*, while this declaration leaves it uncertain whether the debt accrued on the same day or before, and so leaves it open to the presumption that it may have been on the same day, while it avoids the use of the word "afterwards," and so leaves the statement in that respect on better ground than the common counts generally do; for it admits of the presumption that the promise and consideration may have been simultaneous, or at least the one immediately consequent upon and attending the other.

It is necessary in point of form no doubt to shew the nature of the debt which forms the consideration averred, and here the declaration should have stated, that the defendant being indebted in 11*l.* 5*s.*, for goods sold and delivered, or money lent, &c., undertook, &c., but that is of no consequence upon a plea of performance which admits the contract, and appears at any rate from many authorities not to be necessary, except the plaintiff is declaring upon the general assumpsit implied by law. He must then shew the nature of the debt, not merely in order that the court may see whether it be such as a general assumpsit will be raised upon by law without any express promise, but in order that the defendant may know what he will have to answer upon the trial, for there the verdict is to spring wholly out of the debt which the plaintiff may prove, and not from any actual promise of the defendant; and if the plaintiff could declare in terms so vague as to give no more intimation of his demand than, that whereas *the defendant was indebted to him in 100*l.**, he promised to pay, &c., the defendant could not know whether the attempt would be to raise an implied promise against him by reason of a loan of money, or of goods sold, or on what account. But when he is sued, not on a promise left to be implied by law, but on an actual engagement of his own made in special terms, then he is in no such uncertainty; for if he made an actual express promise, he must be supposed to know what moved him to it.

Many adjudged cases proceed on that distinction, Vin. Abr. Assump-



sit, z. 4 (Noy, 95 ; Cro. Jac. 214, 642 ; Hob. 18 ; Palmer, 171). Here the promise is actual and special, and the contract takes its rise from the express agreement of the party.

I conclude therefore that in this case the action being on an actual special promise of the defendant, not on an implied general assumpsit raised by law on an alleged general indebtedness, that the omitting to shew how the debt had accrued which formed the consideration would not be bad on general demurrer; that at any rate it would be now no objection after the defendant has pleaded, submitting to the contract founded on this general statement of consideration; and as to the other and main objection, that the consideration alleged is a past consideration, and will not support the actual promise, I consider that the defendant, having tendered another issue, and more especially an issue submitting to the contract and pleading performance, is not in a condition to raise such an objection, because he has not only admitted a contract, but a contract that is binding on him, and because it is not the certain and inevitable inference from the way in which the consideration is stated, that the promise and consideration were not all parts of one transaction, and upon the principle forcibly stated by Lord Ellenborough, in *Lander v. Robertson*, 7 E. R. 236, the defendant having in express terms admitted his liability and submitted to the contract, everything is to be presumed against him. This disposes of the objection raised to the declaration so far as my opinion is concerned, but we have been led into a tedious investigation of the merits of the objections, and as the points raised by them are of very extensive interest, I will state my impressions particularly, as in the opinion of one at least of my brothers the defendant is still in a condition to rely upon them.

First, it is objected that a past consideration will not support an assumpsit; that a contract made upon it is *nudum pactum*, and cannot therefore be enforced.

No doubt a gratuitous promise, or in other words a *nudum pactum*, cannot be enforced; where the principle applies, it is one highly reasonable and meets with general assent. Where one man, without having received or stipulated for any equivalent from another, promises to give him a sum of money or confer any other benefit upon him, the law looks upon it as the mere expression of a kind intention which the party making may retract, not as a binding engagement which he can be compelled to fulfil.

It would be unreasonable it should be otherwise, for often men's circumstances change and the motives and inducements to intended acts of kindness fail; and to hold nevertheless that a man must fulfil a mere benevolent intention because he has expressed it, though it might be attended with his ruin, would be manifestly unjust. Besides it would be unsafe to receive evidence of promises alleged to be made without consideration, and to treat them as creating legal obligations, for many such promises would be attempted to be set up on slight pretence.

So long as it is necessary to lay a legal foundation for the promise by shewing a *quid pro quo*, there is much less chance of groundless claims being advanced, because there is something to be proved that may account for the promise, and this necessity affords a great protection against fabricated claims.

Then again, there is in law no distinction between a merely gratuitous promise, and a promise made upon the consideration of something which had before been done by A. for B., unless that something be of such a nature that the law regards it as valuable in a pecuniary point of view, and entitled to a recompense. If an act of that nature be done at the request of A., then although no remuneration was stipulated at the time, yet if B. afterwards make a promise to pay, such promise will in many cases bind him—not in all; but according to the nature of the previous act done. A multitude of cases are stated in the books as illustrations of these principles. But there may be many acts done by a person for another and not at the request of the latter, which although they may seem entitled to a recompense yet supply no legal ground for claim; and then as the law raised no promise to pay at the time of the act being done, and as there was no previous request of the party, although he may afterwards engage to pay, yet he will not be bound by that engagement. Those are cases of past considerations which will not support an *assumpsit*.

There is another class of cases arising out of some previous transaction or relation of the parties, and where it is alleged that in consequence of such past transaction or relation, the one party has made a promise in favour of the other grounded on the consideration of such past transaction or relation; and in these cases, unless it can be said that from what is shewn an *assumpsit* resulted in law, at the time of the transaction or of the relation existing, then a promise grounded upon the consideration of that past transaction or relation is a *nudum pactum* and cannot be enforced.

For instance where A. sells a horse to B., making no warranty, and saying nothing of his qualities, the one takes the horse and the other the price, and the transaction is closed. The law raises upon the sale an implied undertaking in A. that he was the owner of the horse and had a right to sell him, but it raises no implied warranty that the horse is sound or free from vice; and if A., at a time distinctly subsequent to the sale, should in conversation with B. warrant either the one or the other, if B. should sue him upon the warranty he would fail, because there was in contemplation of law no consideration for the promise: there would be nothing but the fact of sale on which it could be grounded, and that would be a past consideration, supplying no ground for assuming a further liability than was incumbent on the party at the time.

The object of each had been fully answered; the seller had effected his sale and received his money, and would have no rational motive for charging himself further. It would be very unlikely that he would do so; the law at any rate holds that if he should, he shall no more be bound by it than he would by any other gratuitous undertaking.

So again as between landlord and tenant. A. requests to be allowed to occupy a farm of B.'s and enters and enjoys it; if nothing should be fixed about the specific rent, the law would charge A. as upon an implied promise to pay what it may be worth. But if after the relation between them was at an end, A. should promise that he would in consideration of his past occupation put up certain buildings on the farm, that would be assuming an additional liability in consequence of a past benefit, a benefit which had drawn its own liabilities along with it, namely, such as the

parties had expressed or as the law would imply at the time, but the past occupation would form no legal consideration for the tenant binding himself to do anything in addition.

In these and similar cases it is quite reasonable to hold that the past consideration is no consideration; and speaking in reference to such cases, the principle is often laid down broadly that a past or executed consideration will not support an assumpsit. But it is never meant by that, that a past consideration of any kind will not support a promise—goods sold and delivered, for instance, and not yet paid for, or money lent and not returned. On the contrary, there can be no better or more substantial consideration for a promise than plain debts of this description, and every writer who undertakes to treat the subject in detail is careful to explain the distinction.

By comparing the principles laid down and cases cited in Com. Dig., Action upon the case upon assumpsit, B. 12, with those under the same head of the law ranged under F. 6, it will be seen that the difference has been clearly kept in view.

We are told there “that assumpsit lies on a promise to pay, if the consideration is continuing *though the act be executed*, as in consideration *of goods sold or money lent* at a day past, for the debt continues; so “in consideration that A. had accounted and was found in arrear.”

Nothing can be more express, and the distinction is kept in view clearly enough by all who pretend to explain the subject fully. I refer to Chitty on Pleading, 1 vol., 299, 302, (7th Edition); 1 Sel. N. P. 54, (9th Edition); so also Mr. Chitty, in his Treatise on Contracts, speaking of certain considerations which in law are deemed to be continuing considerations, as promise made in consideration of marriage, adds, “the ordinary case of a promise in respect of an existing debt or “legal liability, before incurred by and then (that is, at the time of the “promise) binding on the party promising, may also be cited as an “illustration of this rule.”

To maintain indeed that an executed or past consideration of that kind would be no consideration to support a promise, would be so contrary to plain reason that it seems unnecessary to cite any authorities for it, and they never are cited, except to guard us against falling into the error of applying to executed considerations of this latter kind, principles which are reasonable when laid down in reference to certain classes of considerations, but which to them would be wholly inapplicable, because though executed, and in one sense past, they are continuing and in that sense always present till the debt is cancelled.

But the specific form of the objection is, that an executed consideration is in all cases without distinction subject to this rule; that though it will support or rather continue to support the general assumpsit raised by law to pay upon request, yet no special promise can be founded upon it either to pay on a certain day or to pay in any certain manner, in short that the existing debt will support the existing implied promise, but no *new* promise without a new consideration; and consequently that in the case before us the defendant could not legally agree, as is stated in the declaration, “that in consideration of his being indebted to the plaintiff in “11*l.* 5*s.*, (admitting it to have been for goods sold or money lent or “any other kind of debt), he would pay him the 11*l.* 5*s.* in carpenter’s “work, upon the plaintiff’s request.”



It is to be observed that there is in this case no postponement of payment by the new agreement, but the debt is to be paid in work and not in money, which latter is the promise that the law would imply.

The defendant relies chiefly, if not wholly, upon the case decided not long ago, in the Court of Exchequer in England, of Hopkins and Wife v. Logan, 5 M. & W. 241. It is not a case that would necessarily govern the present, as being so like in its facts, that the decision in the one necessarily applies to the other.

The case in fact is not in point, because the grounds which called for the decision were very different, but the language of the judges is in point, and very clearly and strongly in point, as applied to the case before us, and it is the language of judges of acknowledged eminence and great experience.

In that case the defendant stood indebted to the wife of Hopkins, before he married, on his bond in 1000*l.*, payable by the bond on the 6th of April, 1840. After the marriage with the plaintiff and after certain payments had been made, the plaintiff and defendant accounted together respecting the monies due on the bond, which had been made in April, 1826, and a balance of 444*l.* 16*s.* 1*d.* was found to be due. The plaintiffs declared in assumpsit on an account stated, saying nothing of the bond, but stating the accounting to have taken place on 1st October, 1838, of and concerning monies lent by the wife before marriage to the defendant and then remaining unpaid; and they averred that the defendant being so found in arrear *in consideration of the premises* promised, the plaintiffs to pay them the said 444*l.* 16*s.* 1*d.* on the 10th of October then next ensuing.

The action was brought in 1838 or 1839. The defendant pleaded that the money lent, and concerning which he accounted with Hopkins, was 1000*l.* due upon bond, setting out the bond as I have stated it, and shewing that the money was not due upon it till 10th of October, 1840; he pleaded that no part of the 1000*l.* was due or payable upon the bond at the time of accounting, and so that the account was stated erroneously and in mistake. The plaintiffs demurred, and raised exceptions in regard to matters of form, but their counsel seemed to feel upon the argument, that his first task was to support his declaration against the objection, that the plaintiffs were trying to accelerate the payment of a debt due by bond, merely on the footing that the parties had within the period appointed for payment stated an account of the balance due. Such a thing was probably never attempted before. If they had, as is always done in declaring on account stated, claimed the sum as being payable on request after the accounting, and relied upon the assumpsit implied in law, then the case would have been open to the exception, that as the money was secured on a specialty and was not yet due, and as no new consideration was stated for a promise so substantially different from the former and so much to the disadvantage of the defendant, the parties could only have been looked upon in reason as accounting concerning a sum of money *debitum in presenti* though *solvendum in futuro*, just as a merchant and his customer might sit down to state an account of goods recently sold upon an understood credit, their object being to settle the precise amount, not to hasten the day for payment.

How the strange fact happened (if the fact was so), that the defen-

dant engaged by parol or by writing to pay on 10th October, 1838, what would not be due till April, 1840, does not appear. It might have been some blunder in drawing up a memorandum, but that was a special promise alleged; and so the defendant was sued for not paying the money on a day not being that on which it was due by his bond, nor being that on which it would be due if he relied on a general assumpsit raised by law on the account stated, because that would of course have been simultaneous with the stating the account.

The learned counsel laboured by arguments, rather ingenious than forcible, to support the assumpsit under such circumstances. For the defendant, among other grounds, it was urged, that the mere accounting together, which was the alleged consideration for the promise, "raised the implication of a promise to pay on request, and did not support a promise to pay at a more distant period." The court apparently decided at once upon the argument, that the declaration was not sustainable, as it might be expected they would, upon a ground which Baron Parke expressly says was fatal, and which he gave as his first reason, namely, that it was not an account really stated, because it is not shewn that any money was *in arrear at the time of accounting*. The declaration carefully avoided that statement; but during the argument, and in giving their opinions, the learned judges all concurred in declaring that the promise which arises in law upon an account stated is to pay on request, and that any other promise is *nudum pactum* unless made upon a new consideration. Lord Abinger said, "the contract declared upon was not binding on both parties, the consideration being executed upon which the new promise is attempted to be founded."

"Any promise," Baron Parke said, "to pay money *in futuro* which is payable *in præsent*, is bad, unless it be on a new consideration; the plaintiff here proceeds on an executed consideration which constitutes an existing debt, and no such new consideration appears in the present case." Baron Alderson held the declaration bad, because "the consideration was clearly executed, and the promise implied is to pay on request. In order" he said "to convert that promise into a promise to pay at a future day there must be a new consideration."

Baron Maule said, "an executed consideration is no consideration for any other promise than that which the law would imply, if it were there would be two coexisting promises on one consideration." And two of the learned judges remarked, if they should hold otherwise then the consequence would follow, "that as such promise may be by word of mouth, the Statute of Limitations might always be evaded without a writing."

Now I am not certain the learned judges meant to carry the principle laid down by them further than was necessary for the case before them; they meant clearly, I think, to hold that where an *accounting together* was relied upon, as it was emphatically in that case for supporting the promise, there could be no promise shewn but such as the law would imply from stating an account, that is, to pay the money upon request. But their language is certainly more comprehensive than it need have been for expressing that opinion, and it does seem intended to lay down the principle so broadly as to maintain, that if A. owes B. a sum of money, no matter on what account, he cannot in consideration of such money being

so due by him make any special contract respecting it, either as to the time or mode of payment. In other words, that a writing to this effect would be *nudum pactum*, viz., "in consideration of merchandise which I have heretofore received of A. B., and for which I now owe him 100*l.*, or "in consideration of 100*l.* lent to me by A. B., I promise to deliver him "so much wheat on the ——— day of ——— next, as will be equal to "that sum at the market price, (or to do certain work for him upon his "request), or to pay him the said sum of 100*l.* on the ——— day of ——— next."

The judgment in *Hopkins v. Logan* does not decide that; the language of the judges perhaps does. If they meant it to extend so far, it is to be regretted that they did not allude to the authorities on which they founded their opinion, or notice the numerous cases to which it was opposed.

In *Kaye v. Dutton*, 8 Scott, 495, the Lord Chief Justice Tindal speaks evidently of this case as if he were uncertain of the principle on which the doctrine in it was founded. "They may," he says, "have "proceeded on the principle, that the consideration being an executed "one was *exhausted* by the first promise, and could not support any "further undertaking." Now I can understand that, when it is spoken of an executed consideration like that in the case of *Kaye v. Dutton*, and in the class of cases referred to by Chief Justice Tindal in the course of his judgment.—*Granger v. Collins*, 6 M. & W. 458. *Brown v. Coppin*, 1 M. & W. 567, and *Jackson v. Cobbin*, 1 Dowl. N.S. 96, which were cases of landlords wishing to superadd conditions as binding on their tenants, on the ground that they had made certain promises in consideration of their past occupation. That was an executed, past consideration, and one can easily understand a defendant, when sued in such an action, saying, "My occupation of your land was a good consideration for the "rent I was to pay, and for whatever other engagements I came into at "the time; but that is all past, and it affords no good reason in law why "I should render myself liable to new conditions."—*Brown v. Crump*, 6 Taunton, 300, was a case of the same description. So in *Roscorla v. Thomas*, 2 Gale, & Dav. 508, cited also by C. J. Tindal, the defendant was charged upon a warranty of horse, made in consideration that the plaintiff *had sold* him the horse. It might in any such case be a question, whether the declaration fairly imported that the warranty was made subsequently to the sale and was not part of the transaction; but if it clearly appeared to be subsequent, then surely nothing can be more intelligible and just than to say in regard to such an executed transaction, that the consideration *was exhausted*. The price given to the defendant had got for him all that was contemplated in the sale between the parties; the consideration raised by it was fairly exhausted when it procured the horse as the equivalent, and any such stipulations as the seller chose to make at the time or as the law would imply; and it afforded no consideration for any subsequent promise of anything in addition. Though to speak of the consideration being exhausted is a technical way of putting the proposition, it is intelligible enough. It only means that the parties having transactions of this nature, after they are closed stand as strangers to each other, there being no outstanding continuing consideration between



them, upon which either has a right to reckon for entitling him to anything more than he has already got. But when I have lent a man 100*l.*, for which he is every hour my debtor till he has paid it, I do not understand how all consideration for any promise between him and me, while he has my money in his pocket, can be said to be exhausted. On the contrary, I had always imagined, and I do not think erroneously, certainly not unless our books are full of most erroneous decisions on this plain point, that it could be made a valid consideration for any special agreement designed by the parties to afford an equivalent, as much so as if I had gone through the form of making my debtor first pay me the 100*l.*, and then handing it back to him as the consideration for the special agreement. It should seem that the money in the defendant's hand is at least as good as my promise would be to pay it to him when he should deliver to me certain goods, or perform certain work which would clearly be a good consideration. It is true, that while he holds the money lent or while he owes me the certain sum for goods sold, there is existing between us an implied assumpsit raised by law, that he will pay me upon request, of which, if I had been left to rely upon it or had chosen to rely upon it, I might have taken advantage and might have grounded an action upon it in the absence of any express promise; but we may agree otherwise, not actually upon a new consideration, but merely upon motives of convenience satisfactory to us both. *Conventio vincit legem* is a maxim very generally applied, and though A. owes B. 100*l.*, for which no day of payment has been set, and which he may therefore be called upon at any time to pay upon request, I do not see why they both may not agree, without any new consideration, that because A. owes the debt he shall deliver merchandise or do certain work to the amount. As to any new consideration, why should it be necessary here? The contract in this case did not postpone the payment, and if it had, that would not call for any consideration to move from the creditor, for the benefit is the other way. In *Hopkins v. Logan*, the effect of the new agreement (though that did not appear in the declaration,) was to accelerate the day of payment of a large sum of money eighteen months before the day appointed in a bond; and a plaintiff in such a case might well be expected to shew what inducements the defendant had for assuming that new and more stringent liability.

The agreement in this case neither postpones nor hastens the time of payment. It is simply an undertaking to pay in labour on request a debt which the defendant stood bound before to pay in money on request. If such an agreement could not be made without a new consideration, from whom is the new consideration to move? I do not see on what ground we are to infer that one party was to give a consideration more than the other, for putting the matter on the new footing. It might be an accommodation to either party or to both; and the fair presumption is, that it was mutually convenient, and that neither was making a sacrifice for which he desired or expected to be compensated. Then why are we to exact a statement of something which may be purely imaginary, and which never entered into the minds of the parties? It might, no doubt, have been averred, that in consideration that the plaintiff would not prosecute the defendant for the money and would discharge him from that contract, he undertook to pay him in work. But no such stipulation

would ever in fact be made, for it would always be believed to be unnecessary. It never does form a part of any writing which passes between the parties on such occasions ; and I have never seen in any case or precedent such a consideration inserted, though I do observe in a late edition of a popular work upon pleading and evidence (Archbold's *Nisi Prius*), the compiler, referring to the case of *Hopkins v. Logan*, recommends the profession (as a new caution not required before) to frame their declarations in *assumpsit* in similar cases, so as to suit the apparent requirements of that decision. I think the fact that the decision in question should seem to an experienced practitioner to render such a change expedient, should lead us to conclude that the language of the judges is either not accurately reported or was capable of being applied more extensively than they intended, for they surely did not imagine that they were innovating in the law in a matter of every day practice, and introducing new principles in the action of *assumpsit* unknown to their predecessors. It is reserved to the legislature to make such changes ; and surely whatever contract or statement of a contract between man and man would have been lawful and regular before that case was decided, would be equally so now. The idea, that an existing debt forms no sufficient consideration for undertaking to build a house, or deliver goods, or pay money to another, but that every such undertaking without some new consideration is to be looked upon as *nudum pactum*, seems to be utterly at variance with what one meets with in the books at every turn. Bills and notes, we know, are allowed to stand on a peculiar footing in deference to the convenience of commerce and their negotiable quality ; and the statute of Anne, in conferring or confirming certain privileges on such contracts, is in fact in its terms confined to notes payable to order or bearer. Still a note promising to pay money to A. B. merely is a promissory note, though not negotiable, and so far partakes of the privilege of such securities that it is not necessary it should bear on the face of it any statement of the consideration for which it was given, nor necessary that any should in the first instance be proved ; it will be presumed, unless the contrary is shewn, that it was given on good consideration. But it is clear, that the moment you shew in fact that there was no consideration between the maker and payee, you destroy the validity of the contract as between them, as much as if it were an *assumpsit* of any other kind. So that if A. by writing promises to pay to B. 100*l.* as a free gift, expressing that on the face of it, such promise could not be enforced as a promissory note or otherwise, because it would be pronounced to be on the face of it *nudum pactum*. But when A. promises to pay B. 100*l.* "in consideration of money heretofore lent by B. to A.," or simply for value received, that is a contract, valid on the face of it ; and yet the consideration is executed and past, as much as in the case before us. And I do not understand how to reconcile it to myself to say that an executed consideration is no consideration to support an *assumpsit*, and yet in the next breath to say that it will make that a valid contract and a good promissory note which without it would be *nudum pactum*. Still if the decision in *Hopkins v. Logan* is in point in the present case, it must go that length ; and it must on the same principle be hereafter held, that if A. should give a writing in these words, "In consideration of "100*l.* due from me to B. for money heretofore lent to me and still

"unpaid, I promise to pay him 100*l.* in such a commodity, &c., on "request," it would be on the face of it *nudum pactum*, and could only be supported by setting up some new consideration which would be either purely imaginary or fictitious, or would be such as the law implied from the very nature of the transaction.

In this province, more than in England, and more formerly perhaps than at present, from the greater amount of money now in circulation, such notes or agreements were in common use. They were called here stock notes. As long as I can remember, I have seen them sued upon and sustained in our courts as special agreements, for which it was necessary to shew a consideration, but which would clearly be supported when shewn to be given for a debt due—in other words, for value received, which imports a past consideration. They were often before the courts, in consequence of their being erroneously declared upon as promissory notes, or in consequence of other questions arising in the action; and I never heard of their being treated as otherwise than binding. In two cases in our own time, which were referred to in the argument (*Waddell v. McCabe* and *Teal v. Clarkson*), just such writings were sued upon, and upon argument and deliberation and search into authorities, were adjudged to be binding, without proof or allegation of any other consideration than a previous existing debt. The argument now is, that they were not binding contracts—that a special undertaking to pay in grain or in any particular manner, or at a future time, a debt in respect to which the law had raised an implied assumpsit to pay in money on request, was a mere *nudum pactum* supported by no consideration, and therefore void.

We should not readily, I think, come to the conclusion that all former judges of this court either decided in such cases without consideration or reference to authorities, or that they failed to appreciate correctly what they found laid down on the subject; though we might more readily concede that, as regards what has passed in our own time.

But it now becomes necessary, in consequence of the apparent bearing of the case of *Hopkins v. Logan*, to examine whether all that has been assumed hitherto on this subject has really been assumed under some extraordinary mistake of the grounds and principles of the action of assumpsit, as settled by the English decisions.

In the case of *Brown v. Coppin*, the counsel who supported the objection of *nudum pactum*, raised in a case, as I have shewn, very plainly different from that before us, desired to avail himself of the late authority of *Hopkins v. Logan*, and in citing it he said it was supported by the reporter's query in *Hodgson v. Vavasour*, 1 Roll. 413. The question, whether a person, merely in consideration of a debt due, can promise to pay it at a future day or in any particular manner, is one of the most simple imaginable; it belongs to one age of our law as well as to another; it must have come at once and constantly before the courts, and cannot have been affected by those changes in the system of society which have gradually moulded and altered some parts of our common law, so as to make them more suitable to a new state of things. It seems strange that the learned counsel should in regard to such a point have met only with a reporter's query, as something that seemed to warrant the late decision in the *Exchequer*; but the reporter referred to



being the Lord Chief Justice Rolle, is of such acknowledged weight as an authority, that any mere doubt started by him would well deserve consideration. Yet it is surely more to the purpose to consider what the same reporter has transmitted to us in his very learned and elaborate Abridgment, as his conclusions upon the state of the law on this point and intended to be a guide to others; and it is still more material to consider what were his own deliberate judgments in similar cases, when he occupied the highest seat in the common law court. Then I refer to Rolle's Abridgment, page 11; Pl. 8, page 12; Pl. 13, 14, 15, 16, 17; page 13, Pl. 20, as affording the clearest evidence, that notwithstanding the query in his report, he took the law to be as decided in *Hodgson v. Vavasour*, 1 Roll. 413, which he there states, and adds several cases affirming it. And what is still stronger, in *Read v. Palmer*, Alleyn, 69, Rolle himself relied on that very case in giving judgment.

"In *Hodgson v. Vavasour*," he says, "the plaintiff declared that the defendant on such a day became indebted to him for wares, &c., and "in consideration thereof, *afterwards* on the same day promised to pay; "this was ruled good, *not as a promise in law*, but as an actual promise "raised on a consideration continuing, which he cited to shew that a little "distance of time, though the same day, alters the intendment of the law." Nothing can be more decidedly opposed than this language is, to the idea that there can be no actual promise to pay a previously contracted but still existing debt; no special promise when there is an implied one.

The learned counsel in *Brown v. Coppin*, however, could have cited something in support of *Hopkins v. Logan* more express and authoritative than a reporter's query, for in *Styles*, 330, there is a case of *Godwin v. Batkin*, in which the plaintiff declared that the defendant, in consideration that he was indebted to the plaintiff in 20*l.*, promised to deliver divers cattle to J. S. to the use of the plaintiff, and for the nonperformance of this promise he brought this action, and had a verdict and judgment, but the judgment was reversed in error, because the court held that here is no consideration expressed which can relate to the discharging of the debt of 20*l.*, and so the promise is but *nudum pactum*, and the plaintiff is notwithstanding the promise at liberty to bring his action for the money.

This case is the same in principle as the one before us; there is no argument of counsel and no authorities cited or reasons given by the court. It is on that account less satisfactory, though it is in this respect satisfactory, that it shews the point to have been early presented to the view of the courts, and it can hardly be supposed that it escaped attention, while case after case was decided against it without allusion to it, as will be found in the books.

I do not indeed find it relied upon or answered or noticed in any other case, and it is remarkable that in the same volume, (*Styles*, 472,) the case of *Couge v. Lewis* is also reported, which occurred five years afterwards, and which is very like that of *Hopkins v. Logan* in its facts, and yet is decided the other way. There the plaintiff had married a woman to whom the defendant was indebted, and the plaintiff and the defendant, after the marriage, accounted together of the debt, and the defendant being found in arrear promised to pay him the money due upon the account *at a certain day*, and not performing that (special) promise, the plaintiff brought his action. On error brought, *Glynn, C. J.*,

said, "it is true the account alters not the nature of the action, but here "the verdict finds that there was a special promise made to pay the "money to the husband, and there may be an *actual promise* in an "*insimul computaverunt*, although the law doth create a promise where "the special promise is not shewn, and it is a distinct day for payment "of the money alleged, and the consideration is good, for it is a debt due "to the husband and he may release it." At another day Green urged, "that here doth not appear a consideration for the special promise, and "then it can be taken but for a promise in law, and upon such a promise "the action cannot lie, for the debt is due to the wife notwithstanding "the marriage." Wild however relied on Partridge's case, and that the promise to pay the money *at a day to come* was a special promise not created by law, and this makes the consideration good, &c. The court did not intimate any change in the opinion which the Chief Justice had before expressed, but it was found that the writ of error was misdirected, and the proceedings not regularly removed, and the case went off upon that.

It is remarkable how nearly this case resembles that of *Hopkins v. Logan*, and how express the language of the Chief Justice is against all that is contended for in the case before us. Partridge's case referred to in it was decided about forty years before, (9 Jac. 1.) before Lord Hobart, and is thus reported, Hob. 88: "Brinsley brought an action upon assumpsit against Partridge, declaring that he accounted for divers sums of money due to the plaintiff by the defendant, and was found in arrear to plaintiff 7*l.*, and the defendant in *consideration thereof* did promise to pay to the plaintiff the said sum of 7*l.*, *at a certain day then to come*, which he did not pay; to his damage, &c. The defendant pleaded non-assumpsit, and the plaintiff had judgment. The defendant assigned for error that the consideration was not sufficient, because the plaintiff did not shew wherefor the money on the account was due, whether for monies received or not or for goods sold; but the judgment was affirmed because by the account the debt was confessed good, and the promise made thereon good." And yet that was a promise on an account stated to pay the money at a day to come.

No lawyer of that age stands above Lord Hobart as authority. His learning and accuracy are to this day spoken of with admiration, and we have here the advantage of having his judgment reported by himself. It is plainly and in terms opposed to the idea, that neither an account stated nor any other *executed consideration* can support a promise to pay on a future day, which is a special assumpsit; and there was abundant authority before his time and after in accordance with his decision.

*Egles v. Vale*, Cro. Jac. 69, decided in the King's Bench a few years before, was to the same effect and even more express, for there the parties accounted together "on the 4th March, 43 Eliz., of monies due, "and the defendant was found in arrear 10*l.*, and the defendant in *consideration thereof* assumed to pay the 10*l.* on the 19th of March following. It was objected in error that there was no consideration to ground such an action, for that the being found in arrear is not any cause to make a special promise, nor is there anything done on the plaintiff's part whereupon the promise should be grounded, viz., the forbearing of the suit, or any such thing, *sed non allocatur, for the debt itself with-*

"out other special cause is sufficient to ground the action." The same case is reported in Yelverton, page 70, and what makes it more remarkable is, that the judgment was actually reversed for error, because the plaintiff had brought his action on the 16th of March, before the day named in the special contract, though after the accounting.

Andrews's case cited in Rolle's Abridgment, page 12, pl. 13, eight years after, was to the same effect: so also Jesson v. Brien, *ibid*, pl. 17; Barton v. Shirley, cited in Rolle's Abridgment, *ibid*, pl. 16, is another direct authority, for there it is laid down, "if the defendant, on 30th of June, was indebted to the plaintiff in 20*l*. for money lent, and being "so indebted, afterwards, on the 30th of July, promised to pay it at a "day to come, it is good, *for that is a continuing consideration.*" Cogden v. Ham, decided in 1650, and cited also by Rolle in his Abridgment, page 13, pl. 21, is precisely the case before us in substance, being to do something else than merely to pay money, though in consideration of being indebted. "The plaintiff declared that the defendant was "indebted to him for divers sums of money, at several times before then "lent to him by the plaintiff's wife, and then due and unpaid; the defendant promised to become bound with surety in an obligation for payment of that money at a certain day; that is a good consideration "though past, for the *debt is a continuing consideration, and therefore* "good without any *other consideration of forbearance to prosecute, or other* "*new consideration.*" Franklin v. Bradell, Hutton, 84, is another authority on the point.

There are many cases in the reign of Elizabeth to the same effect; some are cited in Mr. Justice Doddridge's notes to Dyer's Reports, page 272 (a), and if we were to take the law to have been as stated in the text of Dyer or the notes, nothing can be more clear.

Among other cases Sydenham v. Worthington is cited, from 2 Leonard, 279, in which the court say, "in assumpsit it suffices if there be inducement enough to the promise, *and although it is precedent it is not material.*"

Beauchamp Higgins v. Beauchamp, Cro. Eliz., 282—Error of a judgment in assumpsit. Higgins declared, "that whereas the defendant in consideration that Higgins *had paid* for him at his request to one C., a "year before, 10*l*., the defendant assumed to repay it on request; objected "that the consideration was not good, *because it was for a thing past,* "but adjudged for the plaintiff, the court saying when the payment is to "be at his request the *consideration doth continue, and so is the common course.*"

Many more authorities to the same effect might be cited; the only clear judgment to the contrary that I have met with, is that of Godwin v. Batkin, which I have stated from Styles, though the books contain many cases which may seem opposed to those I have extracted, but are not so in fact, being grounded on considerations of another class, such as would not impliedly create any existing legal debt, though coupled with a previous request, and sometimes without that (depending on the nature of the consideration,) they will support an express promise. Such was the case of Lampligh v. Brathwaite, Hob. 105, and there are many of that class, and of the same class as Kaye v. Dutton and those referred to in it, between all of which and that of a promise made in consideration



of a debt due, there is a plain distinction every where recognized, and which is clearly stated in the early case of *Docket v. Voel*, Cro. Eliz. 885, where the plaintiff declared, that in consideration "that the plaintiff had "on a day then past lent to the defendant at his request 30*l.* for such "a time, the defendant promised to *lend* to the *plaintiff* upon request 30*l.* "for a year, or to give him forty shillings, and it was demurred and adjudged "for the defendant, because the consideration was past and executed, "and the consideration and promise ought to go together, *or else it ought to be a consideration continuing.*"

Now here it is clear the plaintiff was grounding the assumpsit on a past act of kindness in lending him 30*l.*, which was not averred to be unpaid, and upon a promise *afterwards* made to do the same kind act towards him; but the court say that will not do; the promise must be made at the time, unless it be a continuing consideration, which beyond all doubt a debt is, and one of the plainest and least questionable kind.

I know no better sources to look to for authorities, than some of those from which I have quoted, *Dyer*, *Hobart* and *Rolle's Abridgment*, and many of the cases cited were determined in error. It is impossible to read them without being satisfied that the idea, that a binding special promise cannot be made in consideration of a continuing debt, is a subtle refinement discountenanced by the courts in those days, and I cannot help repeating the remark of Lord Coke, "that those judgments being "given with so great deliberation by judges of profound knowledge, and "remaining yet of record in full force, ought not to be discredited by the bare "saying of a judge upon a sudden motion at the bar;" which observation is indeed nearly applicable to the case of *Hopkins v. Logan*, in which no past decisions on this point were adverted to, but the opinions imputed to the learned judges were expressed as if there had never been a judgment in any court to the contrary.

Tracing down the point, as well as I have had time to do since the argument, through the intervening period, I find nothing that could warrant me in holding, that the law had in modern times been placed on any new footing in this respect. No more satisfactory reference can be made on the point than to *Com. Dig.*, where it is laid down by the learned Ch. Baron as clear and certain in his time, that a promise made *in consideration of goods sold* or money lent *at a day passed* is good, *for the debt continues*. So in consideration *that one had accounted* and was found in arrear.—*Com. Dig.*, action on the case upon assumpsit, B. 12.

Nothing inconsistent with this, I think, can be found in any of the numerous treatises and reports of more modern times.

For a long time Mr. Morgan's book on pleading was one of the most approved guides, and he was himself a pleader of great experience. He says in his notes on the action of assumpsit, "so a promise is good in consideration of goods sold or money lent at a day past, *for the debt continues.*" How entirely would this be misleading the profession, if the dicta of the judges in *Hopkins v. Logan* be law to the full extent.

Taking Salkeld as a respectable evidence of the state of the law in Lord Holt's time, he says, (2 vol. 96,) "a promise grounded on a consideration executory or which continues, is good, as for instance, for that "I owe you 20*l.* lent to me, I promise to pay you on *such a day*, this is "good, for the debt continuing the consideration must continue." Nothing can be more express, and it includes the whole question.

In Buller, N. P., in the various treatises on bills and in cases in the reports, there is frequent allusion to certain undertakings in writing intended for promissory notes, but not being so in fact, such as a writing promising to pay a certain sum in East India bonds, or to pay money upon a contingency. It is often stated respecting them that they can be sued upon as special agreements, and I fully believe that it would have astonished any judge, from the time of Lord Hobart to Lord Denman, to be told that an undertaking to pay 1000*l.* in East India bonds, on a certain day, for money lent or other value received, or a promise to accept a bill in consequence of a debt due, was a *nudum pactum*, because the consideration was executed, and on account of the implied promise which the law had clearly raised.

There can scarcely be a stronger proof of this, I think, than the case of *Davis v. Wilkinson*, 10 Ad. & Ell. 98, in which we find a plaintiff declaring in assumpsit on a written promise to pay 654*l.* in four annual instalments, the only consideration laid for the promise being an account stated.

No one can read that case, I think, without being persuaded that the idea, that a special assumpsit cannot be maintained on the consideration of an existing debt, was not present to the mind of either of the eminent counsel concerned in it, or of the very learned judge who decided it. Lord Denman, and the other judges Paterson and Coleridge, are all lawyers of vast experience and high reputation, to whom the bearings of any such question must have been long familiar; and Mr. Justice Littledale, besides being a most eminent and practised special pleader, may be traced for more than thirty years through the reports bearing a part in the most learned arguments in the King's Bench, and having as large a share perhaps, in what may be termed the scientific and difficult business of the court, as any counsel of his day. And it is a further proof of the difficulty which must have seemed to attend the support of such a position, when in *Jackson v. Cobbin*, (1 Dowl. N. S. 96,) the counsel, who called to his aid the case of *Hopkins v. Logan*, thought it material to adduce in support of it, the query of a reporter who had himself as a judge afterwards repeatedly affirmed the doctrine which he had there questioned, and that he should have thought it also material to cite an anonymous case in *Ventris*, and two *nisi prius* decisions, *Peake*, 72, and 2 *Campbell*, 317, which two latter are wholly beside the point.

With respect to the reason given in *Hopkins v. Logan*, that if the court were to hold otherwise, the Statute of Limitations would be evaded by alleged promises to pay without writing, I confess I do not see the force of it.

Until a few years ago, when Lord Tenterden's Act was passed, it was every day's experience, that verbal promises to pay a pre-existing debt, however old, took the case out of the statute, as promises in writing will do still. If there are evasions of the statute, the legislature and courts have sanctioned them, and if the common law did before allow a new promise to be raised on a past consideration, no apprehension that the operation of Lord Tenterden's Act would be affected by an application of the principle, can of itself warrant a departure by the courts from the established principle of the common law.

If the legislature, in order to maintain the one, find it necessary to

change the other, they can make that change, but in the meantime it seems to me that the cases decided upon the Statute of Limitations, afford much more ground for argument in support of an express assumpsit on a past consideration, than against it; I allude now to those cases, in which the courts have refused to act upon conditional promises to pay old debts as if they were unconditional, thereby recognizing a special assumpsit upon a past consideration, and in fact holding the plaintiff to its terms. And I know not what new consideration could be ingeniously feigned in such cases, for the defendant certainly has no motive of interest in engaging to pay a debt, which could not otherwise be enforced against him, and which the plaintiff therefore need not stipulate to forbear. And besides it does not seem to be a legitimate argument, that in order to prevent the effect of Lord Tentcrden's Act being impaired by verbal promises made upon executed considerations, which for two centuries the court had continually permitted, the common law shall be so changed by judicial decisions (for I think it amounts to that), that a plaintiff shall not be able to recover upon a written promise like that before us, made on an admitted valuable consideration, and on an agreement perfectly free from all suspicion.

In the case of *Godwin v. Batkin*, which I have cited from *Styles*, nothing appears to shew that the agreement involved any delay in payment, but merely that the defendant was to deliver cattle in consideration of the 20*l.* which he owed. So far the case was the same as that before us, and the court held it to be *nudum pactum*, because there was no consideration expressed for discharging the debt of 20*l.*, and the plaintiff, they said, was still at liberty to sue for the money.

In the many cases which I have cited, decided both before and after that case, and many of them on writs of error (as the case in *Styles* also was), nothing is said of the plaintiff being at liberty to sue on the original implied assumpsit, although the new agreements there generally postponed the day of payment. The objection was sometimes urged, that there was no consideration for the forbearance, but the court did not give way to the objection, but treated the cases on the broad ground, that the debt was a substantial continuing consideration well capable of supporting the *express* promise founded upon it, and they seem to have considered, that the one and only express promise of the party that was alleged, and which the plaintiff advanced and was willing to proceed upon, and which by his doing so he accepted, put an end to all inferences of implied promises; and this seems to me to be the true and rational footing on which to place the matter in such cases. In *Hopkins v. Logan* there had been a previous express agreement of the defendant, of the most solemn kind: and it could not be denied there, that under the alleged new contract, not under seal as the other was, it was attempted to compel the defendant to pay a debt almost presently, which it had before been clearly agreed should not be paid for eighteen months to come.

In that and in all other cases involving the acceleration of payment on the one side, which is an apparent new burthen on the defendant, or a postponement of the day previously set by actual express agreement, with an apparent disadvantage to the plaintiff, it appears to be consistent with principle, that the party, against whom such a new agreement



is advanced, should be shewn to have had a good consideration for coming under the new stipulation.

In *Hopkins v. Logan*, they were directly charging the defendant on a new agreement to accelerate the payment. In cases of postponement, the objection applies, if at all, indirectly, by its being left open to the defendant, in case of his being sued at the later day for nonpayment, to urge the objection, that he had already stood bound to pay the money on a certain day (previous); that no consideration being shewn for the plaintiff's relinquishing that agreement, he was consequently not bound by it, and that he the defendant therefore remained liable still to pay on the earlier day, and could not by law be liable on the two agreements at the same time. That would seem rather a strange objection in the mouth of a defendant, that the plaintiff could compel him to pay it at an earlier day, and was therefore shewing him an unnecessary indulgence; and I should think it more reasonable to hold, that the main foundation for the promise, namely the debt, might be applied to the second agreement, as well as it had been to the first, being a continuing consideration; and that as to the first agreement to pay, that the plaintiff by proceeding on the second had shewn his acceptance of it, and by consequence his relinquishment of the first, since he could not hold two inconsistent engagements, and could not have a right to a double satisfaction of his debt.

In Comyn's Digest, action upon the case upon assumpsit, G., it is laid down, "that a subsequent inconsistent promise between the same parties *discharges* the precedent, as if A. promise to marry B. within *three* months, and afterwards make a promise to marry her within *four* months—*"otherwise if the last time had been within the three months."* So decided in *B. R.*, between *Hete v. Chaplin*. Lord Ch. Baron Gilbert, in his book on evidence, cites and confirms this case, saying, "that the promise to *"marry in a shorter time did not discharge the first promise,"* (which agrees with *Hopkins v. Logan*, so far as the judgment in that case is concerned,) "*but if the promise had been to marry her within half a year, it would have discharged the first promise, for by taking a latter promise of longer time, the parties must be supposed to intend a discharge of the former, or otherwise the latter promise could have no manner of intent at all."*

This seems to agree with common sense, but I take it, it must be understood to mean when the first express promise had not been broken and was still open and executory, for after breach, accord without satisfaction would be no defence.

In those cases where there appears not to have been any express contract between the parties, and it is merely averred, that A. being indebted to B. in 100*l.* for money lent, in consideration thereof, &c., promised to pay at a day to come, (in which case the assumpsit has been again and again held to be good,) I conceive the court to proceed on the broad ground, that there has been no *actual* contract inconsistent with the one alleged, and that the express assumpsit puts the general implied assumpsit out of the question.

Now in the case before us, the alleged express promise is to pay on request, the same as the law would imply from the alleged debt, only that instead of paying in money the parties have agreed to take the same amount in labour. It is not the certain effect of this assumpsit to post-

pone payment, nor can we on any legal or other ground say, that by agreeing to substitute labour for money, one party more than another gave up any advantage; 11*l.* 5*s.* worth of labour is as valuable as so much money to one that requires the labour, for he will find that he will nowhere get it without paying that for it; why then hold the parties to shew what may be false, that either gave to the other any new consideration for putting the debt in that form? The case of *Pearson v. Pearson*, 5 B. & Ad. 864, is an authority to shew that the plaintiff could well sue on this agreement, independently of the former contract, as a substituted agreement.

Besides, there is nothing in this declaration to shew that there had been any previous breach by the defendant in not having paid the alleged debt. If it had been for goods sold, without more being shewn, the law would have implied that they were to be paid for on delivery; but even then it is not repugnant to anything in the declaration to infer that they had been instantly before delivered. In cases of money lent, the very relation of borrower and lender implies some degree of forbearance or use of the money (*Yelverton*, 171), and I hold that it would be insensible to imagine that there was a breach of an implied contract incurred the instant the money lent passed into the borrower's hands.

The form of the common counts all state, that the general *assumpsit* raised by law upon the *indebitatus*, is to pay when requested. Then, if that be the implied undertaking, this defendant being liable upon a loan (as it might be) to pay 11*l.* 5*s.* upon request, before any request shewn and so before any breach, substitutes for it a contract to pay the same amount upon request in something else than money. I cannot feel it to be reasonable or warrantable that we should at the present day, by entertaining subtleties which the courts have rejected in past ages, when a proneness to more subtle reasoning than was suited to the actual affairs of life was their error—disable parties from carrying into effect by the aid of the law what they have contracted for upon good consideration and in good faith.

Besides many cases already cited, that of *Sidnam v. Worthington*, Cro. El. 42, will illustrate the distinction upon which *Kaye v. Dutton*, *Roseorla v. Thomas*, and other modern decisions turned, as well as many of the old cases, namely, that in order to make an executed past consideration sufficient for supporting an actual promise, the consideration must be of that nature, that it would give a right to demand a recompense—as where the thing done was either such in itself, as must inevitably create a debt without more being shewn, such as goods being sold, money lent, &c., or where the consideration relied upon was something done for another, which would not necessarily from its nature give a claim to remuneration, unless it were done upon the previous request of the other party, in which case the consideration would be sufficient to support a promise, and the same legal consequences would follow.

In *Bosden v. Thinn*, Cro. Jac. 18, where the plaintiff had been obliged to pay money in consequence of his having, at the defendant's request, given his bond to a third party, to secure such third party in the payment of two tuns of *wine* furnished to a friend of the defendant's, and the defendant, on being informed by the plaintiff that he had been obliged

to pay his bond, promised to pay the plaintiff the amount *on such a day*, (which was an actual special promise as in the case before us,) it was objected "that the promise was not sufficient in regard that it was upon a "consideration past." But the court held clearly that there was nothing in the objection. They said the plaintiff had become bound at the defendant's request, and was damnified by reason thereof; "and that the "consideration was sufficient and *not past*," by which they meant that though an executed consideration, and in that sense past, yet that it was a continuing consideration till the money was repaid, and in that sense was not past; and this is consistent with the way in which the principle is stated in numerous authorities. Indeed the case of *Logan v. Hopkins* could not, in the face of so many adjudged cases and of text writers of the highest authority, be looked upon otherwise than as a misstatement of the law, if the court clearly meant to decide anything more than this, (which I do not think they did,) namely, that there being in that case a certain sum of money payable by the defendant to the plaintiff's wife, but not alleged to be then due; the stating an account between the plaintiff and the defendant respecting such monies, not expressly alleged to be *in arrear*, was not a sufficient consideration to support a special assumpsit, because the mere stating the account, was an act passed, on which no promise could be raised beyond the promise implied by law at the time, to pay upon request.

The court saw and knew from the subsequent pleadings in the cause which was before them, that the plaintiffs in fact relied upon the stating the account as a sufficient consideration for promising to pay on the *10th of October*, 1838, money which the defendant had agreed by bond to pay *on 6th of April*, 1840. Whether stating an account of money, which really was not "in arrear," could form a consideration for a promise, either express or to be implied, to pay it before the day which had been appointed for its payment, was one question; and whether the declaration brought out the facts sufficiently for raising that point, and if not, then whether the pleas, by which it was intended to submit the case to the court according to the truth, were good in form as well as in substance, were other questions. In founding their judgment upon what the declaration alone, as it stood, happened to exhibit, the court, if we can trust to the report as being quite accurate, seems to me to have laid down principles and used language broader than the case in its true circumstances called for, and which appear to conflict with reason and authorities more than could have been intended (*a*).

One meets with it occasionally in the dicta of judges, and among others of Lord Holt, (6 Mod. 131,) that there is no such thing as an implied promise, or as it is sometimes called a promise in law, and this is said in order to shew that we cannot allow the Statute of Limitations to be defeated, by adopting the notion of an implied promise by a debtor to pay the executor of a deceased creditor (or his assignee when he has become bankrupt,) a debt, for which the right of action was complete, with the original creditor, and in respect to which therefore the statute had begun to run. If such an implied promise were held to be raised by law where there has been no express promise, nor even any acknowledgment of the

---

(a) See Smith's leading cases, *Lamplight v. Braithwaite*.



debt, made to the executor or assignee, then it would follow that the executor or assignee, grounding his action upon such implied promise to himself, would obtain a new starting point as regards the Statute of Limitations, and thereby in a great measure defeat its operations.

But I confess I am not able to understand why it should be thought necessary, in order to prevent that inconvenience, to maintain that there is no such thing as an implied promise or a promise raised by law—for that there is such a thing as an implied promise is abundantly recognized in hundreds of cases, and in almost every text book that one can take up. Indeed actions are constantly maintained which have nothing to stand upon but an implied assumpsit; actions for instance by one man for fees claimed and received by another (*a*), and in many other cases where the defendant is shewn to have resisted the demand throughout, when so far from having ever promised, he has always disclaimed his liability and refused to pay or refund, and where it is impossible to deny that the only foundation for the alleged assumpsit is the promise implied by law to pay what may be lawfully demanded.

There is surely no danger to the Statute of Limitations in admitting implied assumpsits, and therefore no necessity for running into contradictions and inconsistencies in order to avoid that supposed danger, for I take it to be a plain principle, that where there is once a cause of action complete upon an implied assumpsit, as for instance for money lent by A. B. to C. D., the law will not of itself, and without anything being said or done afterwards by the debtor, raise a second implied promise by him to pay the same debt, either to A. B. or to his executor after him, for if that could be done, then on the same principle we should have to recognize an implied assumpsit every day while the debt continued, and so the statute would be in a manner nugatory. But to hold that one implied assumpsit cannot be raised upon another, is a very different thing from holding that there is no such thing as a promise implied by law. I make these remarks in reference to what might seem at first sight a contradiction between the language of the court, and particularly of Baron Alderson, in *Clark v. Hooper*, 10 Bing. 482, and that held by the Court of Exchequer in *Timmins v. Platt*, 2 M. & W. 720, and for the purpose also of explaining, that so far as I can understand the case of *Hopkins v. Logan*, the idea of danger to the just operation of the Statute of Limitations, which seems to have led the court into some expressions reported as forming part of their judgment, was quite imaginary, for it is clear that where nothing is afterwards said or done by a debtor in relation to a cause of action already complete, there can be no second promise raised by law upon the promise already implied when the debt was contracted, and so no danger of the statute being defeated by a supposed later promise which there could be no authority for implying. But where the debtor, at any distance of time after the cause of action is complete, does expressly promise to pay it either absolutely or on certain conditions, or in a certain manner, or where he makes so plain and explicit an acknowledgment of the debt, that the law will imply a promise to pay, there never has been any doubt that such express promise or acknowledgment will take the case out of the statute.

It is true that now in England the new promise or acknowledgment must be in writing, though formerly it might have been verbal as it still may be here. While our law remains unaltered, (for we have not yet adopted Lord Tenterden's Act,) we have no authority to say that we will not allow a new verbal promise to operate because it would defeat the statute, neither did the courts in England conceive that they could deny to an express promise or acknowledgment the same effect before Lord Tenterden's Act was passed; and now in England since that act was passed, the only difference it can have made in the law in this respect is, in its requiring admissions of the old debt to be in writing, a difference which does not at present operate here.

In the case before us there is nothing to shew that the Statute of Limitations could have come in question, but if in a case in England, in which the debt was barred by lapse of time, the plaintiff should sue in assumpsit on a new special promise made verbally to pay that debt at a certain time, or in a certain manner, the first question would be, whether at common law such a promise (independently of any objection from lapse of time,) would be *nudum pactum* and invalid because founded on a past consideration; if it would, that would make an end to this case; if it would not be so held, (as I have endeavoured to shew it could not,) then the next question would be, whether as the old debt forming the consideration was barred by lapse of time, the plaintiff could in effect defeat the statute by setting up a new verbal agreement to pay the same money on a certain day, or in some particular manner.

If it would be inconsistent with anything in Lord Tenterden's Act, 9 Geo. 4, ch. 14, that the plaintiff should be allowed to do so, then the statute would not in fact be defeated, and the result would be, that in England the new contract could not be relied on, because it was not in writing as required by the statute.

But that objection could not apply with us, and the true question here would be, whether the alleged new agreement, if made in writing as the 9th Geo. 4 requires, would be valid, and if it would, then being made verbally it would be equally valid in this province, unless in a case in which from the nature of the agreement some provision in the Statute of Frauds would apply. If in England the statute of 9 Geo. 4, ch. 14, could not be held by fair construction to disable a plaintiff from suing on any new contract made verbally on the consideration of the old debts, but only from suing on a new promise to pay the old debts, then I think it could only be said that it might be a question for consideration, whether parliament should not have carried the enactment further, not whether the court should change well established principles of law in order to guard against some danger which parliament omitted to provide for. As it never was doubted that in England, before the late statute, if a debtor simply promised by parol to pay the outlawed debt, he could be compelled to do so, there could be no particular danger in holding him equally bound by a special promise to pay it in work or in goods, or at a certain time; and we are now in the same condition here with regard to any such promise, as far as the law is concerned, that they were in England, before Lord Tenterden's Act. The whole question therefore is, whether upon the principles of the common law, and apart from all considerations connected with the Statute of Limitations, a man

who owes another a debt can, in consideration of that debt being presently due, legally promise to pay the amount in goods or labour on request, or in money or otherwise, at a future day.

On the whole, I am of opinion, as regards the case before us—

1st. That the consideration of “value received,” and “being indebted,” both import past considerations not defined, either of which, if it be a good consideration in law, would suffice to support the promise, though the other were bad (there being nothing illegal in either).

2nd. That the consideration in both respects is laid too generally for the purpose of supporting a general *assumpsit* to be raised by implication of law, but that they are sufficiently particular to support an actual express promise alleged to be made by the party, as in this case, upon principles which I have stated, and which are affirmed in many cases, and are in themselves reasonable.

3rd. That without reference to the position in which the defendant has placed himself by his plea of performance, he would be bound by his express promise, made on the consideration of the alleged debt, to pay the amount on request in the manner he has agreed to do.

4th. That at any rate, in this case there can be no question raised about his being liable to perform the express agreement on the ground that he still holds the defendant liable on an implied *assumpsit*, because the plaintiff, by bringing this action on the express contract, shews in the most unequivocal manner that he has accepted that contract, and is disabled from saying that he did not accept it in satisfaction, because—as Chief Baron Gilbert states in his comment on *Hite v. Chaplin*, which I have referred to—by the very taking of the one promise, he must be held to have discharged the other.—See 13 M. & W. 464; 1 Esp. C. 317.

5th. That if any of these points are doubtful (for though I think they are all supported by the weight of authorities, yet in the conflict of authorities doubt may be thrown on some one or more of them), still I think that the fact of this defendant having himself pleaded performance of the new agreement to the extent of 10*l.* of the 11*l.* 5*s.*, and having acknowledged his liability and professed his readiness to perform the remainder whenever called upon, he is not in a situation to dispute about the sufficiency of the consideration merely because something more does not appear, which could only be form and not substance, for the substance of the consideration was really the plaintiff's money, which he has in his pocket.

If the defendant pleading over and tendering an issue upon performance or other matter will relieve the plaintiff, as it has been held to do, from shewing the performance of a condition precedent (which is certainly not form), then it must follow, I think, that this defendant must now be left to contest with the plaintiff upon the fact of his alleged performance, for it seems to me quite clear that the parties cannot by any judgment of this court be thrown back upon their original agreement, against the will of both of them, when the record shews the only dispute to be about the manner and degree in which the second agreement, to which they have both submitted, has been carried into effect. To compel them in such a state of things to revert to the original implied contract, when an express promise substituted for it has been in part performed, and is relied upon by both, would be introducing great confusion.



6th. The defendant's fourth plea, though it does not turn upon performance of the new agreement, comes in my opinion within the same principle, and as fully admits the agreement sued upon to have been made upon sufficient consideration.

MACAULAY, J.—It is objected to the declaration, as ground of general demurrer, that the consideration on which the defendant's promise is founded was past and executed, and therefore that the promise is not binding in law. This objection was not raised in *Waddle v. McCabe*, in which the consideration was an account stated, nor in *Teal v. Clarkson*, in our court, in which the consideration is stated very much as in the present case; nor was it taken in *Davies v. Wilkinson*, 10 A. & E. 98, which bears much resemblance to *Waddle v. McCabe* in the statement of the consideration, but in which however there was room to intend that the accounting and the promise were contemporaneous, and that all formed one transaction. The objection has been suggested by what is reported to have been said in several recent cases in England; and in considering it, the precise terms of the declaration must be kept in view, for it is in reference to them alone that I am about to express an opinion.

Two exceptions are in fact taken to the first count of the declaration: first, that the consideration is a past one, and will not therefore support the special promise or agreement alleged, to which might be added that (if a past consideration could support such promise) it is not stated with sufficient certainty.

Secondly, that the promise laid shews the transaction to have been but an accord executory, to enforce which the action is not sustainable.

The declaration alleges that on the 29th of December, 1841, the defendant, by agreement in writing, for value received by him of the plaintiff, and in consideration of his being indebted to the plaintiff in 11*l.* 5*s.*, then promised to pay the plaintiff or bearer the sum of 11*l.* 5*s.*, which said amount the defendant then agreed with the plaintiff to pay to the plaintiff, or bearer of the same writing, in carpenter work, at the going prices, when called for.

That it is a past consideration, is obvious; for though the words "value received" be equivocal, those which follow, viz., "in consideration of the defendant's being indebted to the plaintiff in 11*l.* 5*s.*," manifest that the consideration is an executed one. This is further evinced, as it proceeds to say that the defendant then promised to pay the same (which, stopping there, is what the law would have implied upon an ordinary pecuniary transaction when the consideration was executed), and to add, "which said amount the defendant then agreed with the plaintiff to pay in carpenter work," &c.

Not only is it a past consideration, but it does not appear in what it consisted—whether the debt became due by specialty or simple contract, and if the latter, whether by express or only upon an implied contract or promise, or whether it accrued at a fixed day, or arose out of a promise to pay on request, or how otherwise; and the origin or nature of the debt in the above particulars may materially affect the question of its sufficiency to support the promise laid, if sustainable on such consideration under any circumstances.

That it might have been pleaded as an accord and satisfaction, had the promise been executed, is also obvious; and this shews, that while it remained executory, it constituted only a bare accord without satisfaction.

The leading cases on which the first and main objection rests, are as follows: 5 M. & W. 242; Hopkins et ux. v. Logan, in Exchequer, E. T. 1839, in which the plaintiff declared upon an account stated, on which the defendant was found indebted to the plaintiff in a large sum, &c., and being so found in arrear and indebted as aforesaid, the defendant, in consideration of the premises, promised the plaintiffs to pay them the said sum of money *on the 10th of October then next ensuing*. This was held bad on general demurrer. Lord Abinger said—"the contract was not binding on both parties, the consideration being executed on which the new promise was attempted to be founded." Per Baron Parke—"There is no consideration for any promise different from that which the law implies—that the promise which arises in law upon an account stated, is to pay on request, and any other promise is *nudum pactum*, unless made upon a new consideration. Any promise to pay money *in futuro* which is payable *in præsentì*, is bad, unless it be on a new consideration."

Alderson, B.—"The consideration is clearly executed, and the promise which the law implies thereon is to pay on request. In order to convert that promise into a promise to pay at a future day, there must be a new consideration."

Maule, B., agreed "that an executed consideration was no consideration for any other promise than that which the law would imply; if it were, there would be two co-existing promises on one consideration."

The next case is 3 Q. B. 234, Roscorla v. Thomas, in Q. B. T. T. 1842. The declaration stated "that in consideration that the plaintiff, at the request of the defendant, *had* bought a horse of the defendant at a certain price, the defendant promised the plaintiff that the horse was sound and free from vice, &c." Held bad in arrest of judgment—the *apparently precedent executed consideration* being insufficient to support the subsequent promise. Lord Denman said—"This case appeared to the court to fall within the general rule, that a consideration *past* and *executed* would support no other promise than such as would be implied by law."

The third case is in 8 Scott, N. R. 495, 502; 7 M. & G. 807; 2 D. & L. 291, S. C.; Kaye v. Dutton, C. P. T. T. 1844, which turned upon the ground, that although a supposed new consideration for the special promise alleged apparently existed, yet upon careful examination it failed, because that which purported to be such consideration, instead of being parted with was *reserved* by the plaintiff, and so the promise was *nudum pactum*. In that case Tindal, C. J., referring to 6 Taunt. 300; 1 Mar. 567, Brown v. Crump; 5 M. & W. 247; 7 Dow. 360, Hopkins v. Logan; 6 M. & W. 458, Granger v. Collins (a); 8 M. & W. 790; 1 Dow. N. S. 96, Jackson v. Cobbin; and 3 Q. B. 234; 2 G. & D. 508, Roscorla v. Thomas—said, "that these cases supported the proposition, that in point of law an executed consideration would support no pro-

---

(a) See note to the American Reprint of this case.

"mise, although express, other than that which the law itself would have implied, to this extent, that when the consideration is one from which a promise is by law implied, then no express promise made in respect of that consideration after it had been executed, differing from that which by law would be implied, could be enforced; but that these cases might have proceeded on the principle, that the consideration was exhausted by the promise implied by law from the very execution of it, and that consequently any promise made afterwards must be *nudum pactum*, there remaining no consideration to support it." He then distinguishes between the cases where from the consideration no promise is implied by law, although it would support a special promise afterwards made in respect of an act done upon request, &c. See also a notice of this case in 2 U. C. Jurist, 244; and also 5 M. & W. 21, Wray v. Milestone.

In 1 M. & G., 166, Thornton v. Jenyns, C P. E. T. 1840; 1 Scott, N. R. 74, S. C., the same doctrine is recognized. In that case Tindal, C. J., referred to Dyer, 272; 1 Roll. Ab. 11; and see also Vin. Abr. Action, Q. &c.; 2 C. M. & R. 408; 4 Dow. 153, Allan v. Probyn; 5 M. & W. 289.

1 Esp. 317, Swears v. Wills, is a Nisi Prius decision, conflicting as reported with Hopkins v. Logan, as do several cases in the old reports: Hob. 88; 1 Roll. R. 413; Pal. 171; Cro. Car. 409; Cro. Jac. 642; Cro. El. 741, 282. Of the older cases, some are calculated to support this declaration, while others have a contrary tendency.

The language used in the late cases is explicit and comprehensive, and the rule laid down therein seems to me deducible from—

1st. The principles which govern simple contracts.

2ndly. Implied promises resulting in law upon executed (pecuniary) considerations.

3rdly. The action of assumpsit for breach thereof.

4thly. The doctrine of *nudum pactum*. And

5thly. The law of accord and satisfaction—in relation to which I would refer to 4 Co. 91, Slade's case; Yel. 21, S. C.; 1 H. B. 550, Rudder v. Price; 2 Bl. Com. 443; 7 T. R. 350 (note), Ram v. Hughes; 7 Bro. P. C. S. C. overruling 3 Bur. 1663; 2 Leo. 225; Doc. Stu. 181; Bac. Abr. Assumpsit, 1 Saund. 264; 12 M. & W. 758; 1 M. G. 265, (a); 11 A. & E. 438; 10 B. & C. 676.

1st. Parol agreements require mutuality of consideration and contemporaneous promises, express or implied.

2nd. Implied promises only result in the absence of express stipulations (2 T. R. 105); but where the latter are intended to bind, they should be embodied in and form part of the original agreement while conventional and executory; for if not, the law implies the promise immediately upon the execution of the consideration, and regards it as having been performed with a view to and only in consideration of such implied promise, and in pleading there is no difference recognized between promises express and implied. Of course I do not here mean to include those cases in which the consideration is insufficient to raise an implied promise, though it may be sufficient to support an express one.

3rd. The action of assumpsit is in the nature of an action on the case, sounding in damages, and a right of action accrues immediately upon



breach of the promise, whether express or implied.—13 M. & W. 233, 234; 1 C. M. & R. 245; 2 M. & W. 461.

4th. A past consideration is as a gratuitous or no consideration in respect of any future, special or executory promise (after the law had previously implied one upon its execution) made in respect of the same, and on no additional or other consideration.—3 Bur. 1663; 7 T. R. 350; 11 A. & E., 438; 3 M. & W. 90; 7 M. & G. 815, *Kaye v. Dutton*.

5th. A mere accord unexecuted cannot be set up as a defence in an action brought upon the original demand, nor can it be enforced by action; however, a new executory agreement, substituted for and accepted in satisfaction and discharge of the existing debt, may be pleaded as a defence by one party, or afford a good ground of action to the other.

The inference, as applied to the case before us, seems to me to be, that the first count of the declaration is bad, on the ground that a past and executed consideration (whatever it consisted in) is laid to support the agreement, for which purpose it is insufficient without more, either expressly stated or necessarily implied.

It is clear that no additional consideration is expressed, nor can it be inferred from the premises; the declaration states no more than that in consideration of the defendant being indebted to the plaintiff in 11*l.* 5*s.*, he promised to pay the amount, and agreed to pay it in carpenter work. A declaration so framed in an action for the money as due upon an implied promise in law, would be demurrable for uncertainty (*a*), and even if sufficient to support an express promise, though inadequate to raise an implied one, it imports a past consideration and nothing more; and anything supplemental—as forbearance—acceptance of the new promise in satisfaction of the damages for the existing breach of promise—or other new consideration on the plaintiff's part for the new promise on the defendant's part, should have been stated if any existed.—4 East. 454; 6 East. 568.

Another observation is, that the plaintiff was not reciprocally bound; nothing appears to extinguish his subsisting right, or to prevent his suing at any moment for the original debt in money upon the original consideration, and the only ground on which such a contract as that declared on could be sustained, would be that the new promise was in itself, before and without performance, accepted in satisfaction and discharge of the existing demand, if that would do, of which I am by no means persuaded.—See 2 Keb. 851, *Brown v. Wade*; 3 D. & L. 392, *Verbyst v. Dickson*; 1 M. & W. 153, *Sard v. Rhodes*; 1 Smith's Leading Cases, 150—note at the end.

A right of action had vested in the plaintiff, treating the debt as having accrued upon an executed consideration, on which the usual implied promise to pay on request arose, and such right of action could not be extinguished without a release or an accord and satisfaction. This is proved by the following consideration: an action might have been brought without any previous request—13 M. & W. 233, 234; 5 T. R. 141; 2 H. B. 317; 1 Ld. Raymond, 122; 12 Mod. 538. The

---

(*a*) *Jenkins*, 330, Ca. 61; *Vin. Abr. At. Ass. z.* 4; *Cro. Jac.* 207, 213, 397, 548, 642; *Cro. Car.* 6; 12 Mod. 511.

Statute of Limitations commenced running immediately, which it would not do, had not a right of action accrued.

A plea of payment would be not in performance but in confession and avoidance, and in bar of damages for the non-performance of the promise.—Tyrwhit, Pl. 293.

So of the plea of tender—1 Lord Ray. 254; 8 East. 167; 2 M. & W. 225; 11 M. & W. 233;—and of accord and satisfaction—1 C. M. & R. 245; 2 M. & W. 461; 1 C. M. & R. 522; 3 Dowl. 195; 1 D. & R. 546; 5 B. & A. 886; 4 Mod. 250; 1 M. & W. 556; Chitty Jun. Forms, 361, note (o), in which he says that when no time for the payment of a debt is provided by the parties, it impliedly accrues due *immediately* (13 M. & W. 233, 234), the consideration for it has attached without demand. For instance, in the case of goods sold and delivered, when no credit was agreed upon, the price becomes due on the delivery of the goods, and if not *then* paid, though not demanded, there is in law a breach and right to nominal damages, and in such case the plea should be as above (i. e. in full satisfaction and discharge of all the damages by the plaintiff sustained on occasion of the non-performance of the said promises in the introductory part of the plea mentioned, and of the plaintiff's damages by him sustained on occasion of the detention thereof), though it is otherwise when the payment has been made as soon as the debt became due—when in short there has been no breach or default.—1 M. & W. 556, *supra*; and in such cases the usual *licet sæpius requisitus* need not be stated in the declaration.—2 H. B. 131; 1 B. & P. 59, 60; 10 Mod. 81; 1 Sal. 622, 623; 3 Sal. 341; 2 M. & W. 223; 8 East. 168; 1 Ch. Pl. 325.

This case must not be confounded with executory contracts varied or suspended while executory and before breach. The cases on this head were much considered in *Hurlburt v. Thomas* in this court.—2 B. & Ad. 328; 3 B. & Ad. 701; 5 B. & Ad. 58, 742, 859; 10 A. & E. 57.

I do not look upon an executed consideration as continuing in the proper sense of the term, for any purpose except to support the original promise or the promise implied in law, certainly not to support a new executory promise, unless such promise be accepted in satisfaction of the debt, in other words of the original consideration and promise so as to obliterate the same, and thenceforth to place both parties on an equal footing in the new relation.

Lastly, the promise laid shews that the transaction was only on accord, which cannot be enforced by action, though it was formerly otherwise, when it might be pleaded as a defence—a doctrine long since exploded.—T. Ray. 450; Vin. Ab. Accord, A. 11; Comyn's Digest, Accord, B. 4. C.

The doctrine of accord and satisfaction had its origin in relation to torts and vested rights of action sounding in damages, and the history of the action of *assumpsit* will shew how it became applicable and a valid plea therein, as it undoubtedly is.—4 Co. 91; 1 H. B. 550: Dyer, 75; Com. Dig. Plr. 2 G. 9.

Ba. Abr. "Accord" is an agreement between two persons to give and accept something in satisfaction of a trespass, &c., done by one to the other. This agreement when executed may be pleaded in bar to an action for the trespass, for in all personal injuries the law gives damages

as an equivalent, &c., and present satisfaction is a good plea, but if the wrong-doer only promises a future satisfaction the injury continues till satisfaction is actually made, and consequently there is a cause of complaint in being, and if the trespass were now barred by this plea he can have no remedy for the future satisfaction, for that supposes the injury to have continuance.

Ib. B.—an accord with satisfaction generally is a good plea, in all actions where damages only are to be recovered.—6 Co. 44; Dyer, 75, note. It cannot be pleaded without performance, Lord Ray. 122. For forms of plea, see Chitty on Forms, 206; 2 Bing. 700; Cumber v. Wayne, 1 Str. 425; 1 Smith's leading cases, 146 and note; Plow. 5, 11; 9 Co. 79. But before there can be an accord there must be a vested right to damages existing to be satisfied, and if so, accord alone without performance is no discharge or extinguishment of the right of action. In the present case, had carpenter's work been done to the amount promised, that is, the full amount of the debt, doubtless, to an action founded on the original demand, the defendant might have pleaded such work as an accord executed; and I cannot but regard the transaction, as stated on the face of the declaration, to be nothing more than an accord not executed, or taken in connection with the pleas only as partially executed, which is the same thing as respects its legal effect as a defence.

T. Jones, 6, Shepard v. Charles, 23 Car.—In assumpsit the defendant pleaded an accord to make divers things, and averred performance in part, and tenders to perform the residue, but the plaintiff refused. On demurrer, judgment was given for the plaintiff.

Rayne v. Orton, Cro. El. 305, assumpsit for 50s., plea, that after the assumpsit there was a concord, that the defendant should give the plaintiff 15s. parcel, and 35s. the residue the plaintiff should receive in hats, and alleged payment of the 15s. and a readiness to pay the residue in hats; demurrer and judgment for the plaintiff. A concord executory in part being no plea—for a concord is always to be entirely executed.

Brown v. Wade, 2 Keb. 851, 23 Car. 2. B. R. In *indebitatus assumpsit* the defendant pleads an accord to pay 10*l.*, and deliver silk stockings, which was paid and *paratus* to deliver the other, and that the plaintiff accepted the defendant's promise in satisfaction, to which the plaintiff demurred, and *per Cur.* it is no plea, not only because it is not executed, but because there is only an action given and that is no satisfaction, and no more than one bond against another, and judgment for the plaintiff.

This case suggests the difficulty how far one executory parol agreement or promise can be substituted as a satisfaction for a previous parol contract already broken, or for a debt already due in money on simple contract.

Godwin v. Batkin, Styles, 330, (1652).—A writ of error was brought to reverse a judgment given in an action of trespass on the case, wherein the plaintiff declared, that the defendant in consideration that he was indebted to the plaintiff in 20*l.*, did assume and promise to deliver divers chattels to J. S., for the use of the plaintiff, and for the nonperformance of this promise he brought his action, and had a verdict and judgment,



but the judgment was reversed, because the court held that there was no consideration which can relate to a discharge of the debt of 20*l.*, and so the promise is but *nudum pactum*, and the plaintiff is notwithstanding the promise at liberty to bring his action against the defendant for the money.

Reeves v. Hearn, 1 M. & W. 323. Declaration by an executrix, that after the death of the testator, the defendant was indebted to her as executrix in 11*l.*, for goods sold and delivered by the testator to the defendant, and *in consideration thereof and that the plaintiff as executrix* had agreed with the defendant to accept a suit of clothes, to be made by him for J. R. the plaintiff's servant, in part discharge of the debt, &c., and had also agreed to *forbear* and give the defendant a reasonable time for the payment of the remainder of the debt, the defendant undertook and promised the plaintiff as executrix to make and provide the said suit of clothes for J. R. within a reasonable time, and to pay her the remainder of the debt after a reasonable time for such forbearance; the declaration then averred, that though a reasonable time had elapsed, the defendant had not made or provided the clothes or paid the residue of the debt. Plea, that the debt, in consideration of which the said promise was made, did not accrue to the testator within six years next before the commencement of the suit, &c. On special demurrer to the plea, held, that the agreement stated in the declaration was only an agreement for an accord, and did not extinguish the original debt, which therefore was barred by the Statute of Limitations.

Lord Abinger said, "suppose the Statute of Limitations out of the question, then it is an agreement to pay part of the debt by supplying a suit of clothes, part in cash. If the defendant does not so pay "how is the debt extinguished? There is no new consideration." Parke, B., said it appeared to him to be no more than an agreement for an accord in equity, &c.,

The agreement was perhaps invalid on other grounds, as being, for example, a contract which she could not make as executrix; but the decision of the court turned upon the nature and effect of it, and it was held to constitute only an accord.—9 Co. 77, Peyton's case; 1 Rolle Abr. 129; T. Ray. 450, Case v. Barber, *ib.* 203; 2 Keb. 690; 1 Mod. 69; W. Jones, 158, S. C.; 1 Mod. 205; 2 C. M & R. 408, Allen v. Probyn; 5 M. & W. 21, Wray v. Milestone; 5 M. & W. 289, Collingboun v. Mantell; Doc. & Stu. 176-7, chap. 24; 3 Bing. N. S. 915, Bayley v. Homan—To covenant for neglecting to repair—plea, that after covenant broken an agreement was entered into between the plaintiff and the defendant, in consideration that the defendant at the request of the plaintiff had become tenant of the premises from year to year at a certain rent, and had at the request of the plaintiff promised to repair the premises before the first of April then next, the plaintiff would give time to the 12th of April for such reparation without bringing an action, and in case the premises should be repaired by the 12th of April, would relinquish all claim in respect of the breach of covenant, with an averment, that notwithstanding the defendant was ready and willing to perform the agreement, the plaintiff commenced his action before the 12th of April. Held, ill on arrest of judgment, as being at best a plea of an accord executory only and not executed; and see the language of C. J. Tindal in giving the judgment of the court.

The difference between a new agreement in respect of the old consideration substituted in satisfaction and discharge of the debt, and an accord unexecuted, would be, that in the one case the original right of the creditor resulting from and depending on the original consideration would continue, and the debtor would remain liable, while in the other they would be extinguished and the debtor be discharged, and the only remaining remedy of the creditor would be under the new executory agreement, unless the new promise in itself is accepted as both an accord and satisfaction, and as at once discharging the existing debt or demand; before its performance it is accord only and must be executed, and without execution the parties, as to their respective rights and liabilities, remain in *statu quo*.

I have found no case in which a subsequent special promise to do something other than to pay in money, as to satisfy in work or goods, &c., founded on an existing debt due upon a past and executed consideration, has been determined to be sustainable.

In the case of *Hog v. Block*, Moore, 685, case 947, which is the nearest approach to it, there was a new consideration, viz., forbearance. There are cases both old and recent against it, some of which I have cited. I believe the old cases which conflict with *Hopkins v. Logan* go no further than to hold, that a subsisting debt constitutes a sufficient continuing consideration for a promise to pay in money at a named day, to support an action after the day is past, but the books exhibit much hesitation and fluctuation on the subject. *Hodges v. Vavasour*, 1 Rolle, 413, is queried at the bottom of the report, and *Janson v. Colman*, ib. 396.

8 M. & W. 795, and others, do not seem to accord with that case, and Hob. 88, and others of similar import; and of all these cases it may be observed, that the day appointed for payment having passed, the original promise to pay on request revived or continued, and there was nothing to prevent a recovery in money in an action framed on the past or executed consideration in the ordinary way. Besides which an additional or new consideration, viz., forbearance, might have been implied, not that I can conceive that a mere promise to forbear a debt due and payable presently, would bind the creditor to wait till a future day without any equivalent advantage, or anything more than the renewed promise of the debtor to pay at the end of such extended period, what is due and payable already.

I have not failed to turn my attention to the Provincial Statutes 3 Wm. 4, ch. 1, sec. 22, and 4 & 5 Vic., ch. 3, sec. 20, respecting what are commonly called stock notes. They seem to me to render such notes actionable in themselves, like promissory notes in the Court of Requests, but do not go far enough to render them universally so; many such notes too are no doubt given upon and constitute the original promise or terms of special executory agreements, while others (like the present,) are founded on past considerations, and as the statutes only relate to the Court of Requests, I do not feel that in this court contracts or promises of this kind can be governed by any other rule than by the law of England. They cannot therefore be declared upon as promissory notes, and consequently they can only be used as evidence of a special promise or agreement, in support of a count framed on the special agree-

ment, when they constitute the original promise, but then a sufficient consideration must be shewn and that the promise was original. The objection here is, that the consideration is past and executed, and insufficient to support the new executory promise laid, and that the action should have been founded on the original promise as well as the original consideration.

The result, after the best attention I can bestow upon the subject, seems to me to be, that when a consideration is executed without any special understanding as to the mode or time of payment, the law immediately upon its execution raises an implied promise to pay in money on request, and that any subsequent special promise, afterwards engrafted on the same consideration, or made in consideration of an existing debt, which is in effect the same thing, is a promise made in respect of a past consideration and invalid as a new executory agreement, being only an accord requiring to be executed to give it effect; and that a bare agreement or promise (as in the present case,) to pay in carpenter's work a subsisting debt payable presently in money, which had accrued upon some past transaction, seems to me to amount to nothing more.

Of course, where an executory promise, whether oral or in writing, (for there is no difference between them,) is made in respect of a consideration also executory, it no doubt constitutes part of a perfectly valid and good agreement, and may be enforced accordingly in an action special or general, according to circumstances, founded on such consideration when executed, and an existing debt is a perfectly good consideration to support anything of adequate value given and received in satisfaction thereof—then the accord is executed. Where an executory promise is made under seal, it of course forms quite another question.

It appears to me on the whole therefore that the declaration is bad:

1st. Because the only consideration alleged is past or executed, and therefore insufficient to support the subsequent special or executory promise alleged.

2ndly. Because the consideration is not stated with sufficient certainty.

3rdly. Because the agreement or promise stated is only an accord executory.

In adopting this view, I am only endeavouring to conform to what I take to be the clear weight of authority on the subject, for in doing so I have had to relinquish prepossessions of a contrary tendency, and have only yielded my former impressions to what seems to me to be of paramount authority and the true rules of construction.

McLEAN, J.—The allegation in the first count of the declaration, "that the defendant 'for value received' by him of the plaintiff, and in consideration of his *then* being indebted to the plaintiff in the sum of 11l. 5s., promised to pay that sum in carpenter's work, &c.," is relied upon by defendant as shewing a past consideration, and one on which no promise can be raised, except what is implied by law to pay in money on request.

Where a debt is contracted on any account, the law implies a promise on the part of the debtor to pay it on request to the party entitled to receive it, and an action can unquestionably be maintained to recover the amount in all such cases; but where a debt is contracted which according to the understanding and agreement of the parties is to be paid at



some future day, the express promise to pay at that day supersedes any implied promise raised by law, and the contract or agreement to pay cannot be enforced till the arrival of the day, and then only on the express promise.

Where goods are sold or money lent or labour performed, or other consideration is given with a certain credit or time for the payment, the contract to pay must generally be for a past consideration, as promises to pay money are not usually made till value in some shape is received, and the very words "for value received" import that before the signing of an instrument containing them, the consideration has been given by the payee to the promiser. Now, if the consideration can be regarded as past for any period of time, and yet a promise to pay for such consideration must be held good, I do not see by what authority or on what principle it can be held, that a promise made for a consideration which passed two years ago shall be held invalid, though the consideration is still existing and recognized by the parties, any more than a promise made between the same parties on a consideration passing from the one to the other on the same day, or perhaps an hour before the making of the promise. All, as it appears to me, that the law requires is, that there should be an actual, existing, *bona fide* consideration to support a promise, and if such be existing, the law will enforce payment according to circumstances, on an implied promise, where no time or manner of payment is agreed on between the parties, and on an express promise where such has been made.

It seems to me that to hold that a man who has a debt due to him for any length of time, and for which he may hold a promissory note, cannot change the nature of his security, and take an agreement from his debtor to pay the amount in any commodity which may suit their mutual convenience, or at any *time* or manner which may be agreed upon, would be imposing most inconvenient and injurious fetters on mercantile transactions, and indeed upon the ordinary money dealings of the community, and such as would not long be submitted to, being wholly inconsistent with that freedom of intercourse which the public good requires, and which the law sanctions in all transactions founded on good and valid considerations.

To hold that a builder, who owes a sum sufficient to pay for the erection of a house, cannot enter into a contract to erect such house in consideration of his debt, because it is a past consideration received by him years before, without superadding something (a shilling or a penny,) in the shape of a new consideration, seems too absurd to be regarded as law, and yet if the opinions which have been expressed by able judges in the case of *Hopkins & Wife v. Logan*, 5 M. & W. 241, are to be taken as conclusive on that point, we should be compelled to say that such a contract might be successfully resisted for the want of a *new* consideration. That case was assumpsit on an account stated, in reference to the sum of 1000*l.* money lent by the wife to the defendant before her marriage, and of and concerning a sum of 555*l.* 3*s.* 11*d.* paid by defendant to her, and a balance of 444*l.* 16*s.* 1*d.* was alleged to be found due and owing by defendant to the plaintiff, and being so found in arrear, that defendant, in consideration of the premises, promised the plaintiffs to pay them the said balance *on the 10th day of October then next*. In that

case Lord Abinger considered the declaration bad, because the contract declared on was not *binding* on both parties. The liability of the defendant in that case, on the account stated, would be to pay the amount on request; to render him liable to pay on the promise *there* alleged to pay *on a future day*, there ought to be some *new consideration*; and in the same case Baron Parke states even in broader and stronger terms; "the promise as laid cannot be supported, because there is *no consideration* for *any* promise *different* from that which the law implies; the promise which arises in law upon an account stated is to pay on request, and *any other* promise is *nudum pactum*, unless made upon a new consideration. Any promise to pay money *in futuro* which is payable *in presenti* is bad unless it be on a new consideration. The plaintiff here proceeds on an executed consideration which constitutes an existing debt, and no such new consideration appears in this case." Alderson, Baron, expressed a similar opinion, and stated as an additional reason which had also been urged by Baron Parke, that if the promise to pay at a future day did not require a *new consideration*, the Statute of Limitations might be evaded without a writing. Maule, Baron, agrees that *an executed consideration* is *no consideration* for *any other* promise than that which the law would imply, and he adds, if it were there would be *two* existing promises on *one consideration*.

In the declaration, the money, in reference to which the account was alleged to have been stated, was merely alleged to be for money lent by the wife, without any statement that it was at the time due and owing by the defendant, but it contains an averment of a certain amount being found due and owing by the defendant to the plaintiffs, and that being found in arrear defendant promised to pay it.

From the tenor of the declaration it could only be inferred that it was a simple contract debt contracted with the wife while sole, respecting which an account was stated with the husband acting for himself and his wife, and the money being received by defendant from the wife while sole was regarded as a *past and executed consideration*, which could support no other promise than one implied by law to pay on request.

I must confess I am not able to view the matter in the same light, and that I am at a loss to imagine why a *present, existing, valid* consideration, with respect to which parties are at liberty to make any arrangement they please, *must* be regarded as *past and executed*, so that if a new contract is founded on it there must be *something additional* to support it.

If a new consideration be necessary to support a promise to pay at a future day, or in any other manner than in cash, where there is an acknowledged and existing debt, from whom is such consideration to proceed? Surely not from the party entitled to the money; it would be most unreasonable that he should pay an additional consideration to his debtor for taking his promise or contract to pay at a future day, and thus granting indulgence, and if the time of payment be postponed, or terms of payment are accepted by a creditor for an old debt, without any new or additional consideration, it ought not to lie in the mouth of a debtor to object to such new contract, because he has paid no consideration for it.

In this case the first objection stated by Lord Abinger in the case of *Hopkins & Wife v. Logan*, that the contract declared on is not binding on both parties, cannot apply. The plaintiff having agreed to accept

carpenter's work at the going prices, could not revert to the original consideration for the 11*l.* 5*s.*, and at all events he does not do so, and when he declares on the existing agreement between him and the defendant, and the defendant admits that agreement and alleges a part performance of it on his part, it does not appear to me that it is competent to him to object that his agreement is invalid, because he has received no additional or new consideration for entering into it.

If the plaintiff had attempted to sue on the original consideration, leaving out of view the agreement relating to the work, the defendant might plead the special agreement, and shew that it had been in part performed, and that he had been always ready and willing and offered to do the residue of the work according to the terms of his agreement, and in such case the plaintiff must have failed in attempting to enforce a contract, which had been wholly changed and superseded by the new agreement.

The numerous authorities which have been cited by the Chief Justice in the very elaborate and able judgment which he has given in this case, appear to me to lead irresistibly to the reasonable conclusion, that an *assumpsit* may be maintained on a promise made for a consideration which is called a past consideration, from its having accrued at a period prior to the promise, *if* such consideration be *continuing* and *existing* at the time of the promise.

In all cases arising under the Statute of Limitations, a new promise has always been held sufficient to entitle a party to sue, though the consideration for such promise must have been long past, and if a verbal promise in such a case has been deemed sufficient, surely an undertaking in writing to pay such a demand at a future period in cash or in any other manner must be valid.

Considering then that the declaration is not bad on the grounds taken by defendant's counsel, it becomes necessary to look at the pleas demurred to, and that part of plaintiff's replication which is objected to by the defendant on special demurrer. The third plea sets up a new agreement between the defendant and the plaintiff, which is not alleged to have been accepted or intended as a discharge of the old one. It alleges an agreement for the erection and finishing of a driving shed by defendant for plaintiff at the price of 16*l.* 5*s.*, from which the sum of 11*l.* 5*s.* was to be retained and deducted by plaintiff in full *satisfaction* and discharge of the *said* agreement, shewing that in fact the agreement was only to be considered discharged when the plaintiff should be able to deduct the 11*l.* 5*s.* from the amount of defendant's work at the going prices at the shed. The plea goes on to allege that defendant did work at the shed to the value of 10*l.*, but he does not say that his work was of that value at the going prices, so that the fact may be that the sum of 10*l.* was the defendant's own price for his own work, and not the ordinary or going price in the country. The defendant shews as an excuse for not finishing the shed, that the plaintiff did not furnish the necessary materials according to his agreement, and alleges his own readiness to proceed with the finishing of the shed and to pay off the agreement in the first count mentioned, on being furnished with such materials. The plea does not aver that defendant was not required by plaintiff to do other work besides that on the shed, and it seems to be assumed that the work on



the shed was the only mode by which the defendant was bound to pay off the amount stated in his agreement, whereas by the terms of the agreement he was bound to pay it off or discharge it in carpenter's work, such as might be required by plaintiff at the going prices.

It is quite consistent with the defendant's allegations, that though the plaintiff may not have had materials fit for the driving shed, he may have had plenty of materials fit for other carpenter's work, and that defendant may have been requested to do other carpenter's work to fulfil his agreement, and may have refused to do it as alleged in the declaration. For these reasons I think the third plea is bad.

The fourth plea alleges a new agreement to have been made for the building of the driving shed, before any breach of the agreement in the first count mentioned; that the price was to be 16*l.* 5*s.*, but defendant was only to receive 5*l.*, being the difference between that price and the 11*l.* 5*s.* mentioned in the agreement in the first count, and that the new contract was agreed to be substituted for and to be in place of the one in the first count mentioned, which should be rescinded, and that the same was and is wholly rescinded.

There is no doubt that after entering into a contract and before any breach, any other agreement may be made and substituted by the parties in lieu of their first contract, and the substituted contract will be a bar to a recovery on the first, if such contract be substituted after breach; then it must be accepted in satisfaction of the first and so alleged. Here it is expressly stated that the new agreement for the driving shed was before any breach of the former agreement substituted for it, and that the former agreement was rescinded, or in other words, that the first contract was discharged by a subsequent and different agreement when the parties were on equal terms, no breach having taken place on either side.

I consider that this plea sets up a valid discharge from the first agreement, which if true would be a good defence to the action, and that defendant is entitled to judgment on the demurrer to the plea.

There is also a demurrer to the plaintiff's replication of *de injuriâ* to the defendant's second plea, which, so far as the allegation of work performed on the contract, is in discharge of the action, and as to the residue is in excuse for nonperformance. The replication, that defendant of his own wrong broke his contract, is certainly not an answer to a plea alleging a part performance of it; it does not confess and avoid that allegation, nor does it traverse it, and therefore is bad. The plaintiff should have framed his replication to meet the plea, denying the work alleged to have been performed, or admitting work of a certain value, and stating that the residue of the contract remained unperformed from the defendant's own wrong, and not for the reasons assigned by him. The plea alleges work of a certain value done on the contract and accepted by plaintiff, and though it is not stated to have been performed before breach, as it is alleged to have been *accepted in part payment and performance of the agreement*, it appears to me that is sufficient and that the plea may be sustained.

JONES, J., being in the Practice Court during the argument, gave no judgment.

*Per Cur.*—Declaration good.

MACAULAY, J., *dissentiente*.

## LANE V. STENNETT.

The defendant pleads the Statute of Limitations—the plaintiff replies absence in England—the defendant rejoins that the plaintiff has had an agent in the province transacting his business, and that he might have sued. *Held per Cur.*, that this rejoinder could not give the defendant the benefit of the statute.

Declaration in assumpsit upon the common counts for goods sold and delivered, interest, and an account stated.

5th plea: That the said several causes, &c., did not accrue to the plaintiff at any time within six years next before the commencement of this suit in manner and form, &c.

Replication to 5th plea: that at the time when, &c., the said causes of action did accrue to the plaintiff, he the plaintiff was in parts beyond the seas, to wit, at London, in that part of the United Kingdom of Great Britain and Ireland called England, and that he the plaintiff did not at any time since come or return in that part of the Province of Canada formerly called Upper Canada, and this the plaintiff is ready to verify, &c.

Rejoinder: That at the time when the said causes of action in the declaration mentioned accrued to the plaintiff, he the plaintiff was and hath continued in parts beyond the seas, in manner and form as in the said replication alleged; for rejoinder nevertheless in this behalf the defendant saith, that the plaintiff was and is a merchant-tailor in parts beyond the seas, to wit, at the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and was accustomed to furnish goods in divers parts and countries, and in parts beyond the seas, from the said city of London, through and by means of agents, who had full power and authority from the said plaintiff to enter into contracts for the plaintiff, and to sue for and recover for and in respect of contracts with or monies due to the plaintiff; and the defendant saith, that the causes of action in the declaration mentioned were for and accrued in respect of certain goods furnished by the plaintiff to the defendant more than six years before the commencement of this suit, through one John Lane, then, to wit, on the thirteenth day of December, in the year of our Lord one thousand eight hundred and thirty-nine, and for a long time before and afterwards, being the agent of the said plaintiff, and as such agent possessed of all the powers and authority of an agent as above mentioned in and for that part of this province formerly constituting the province of Upper Canada; and the defendant further saith, that the said John Lane, so being and continuing such agent and so empowered as aforesaid, was at the time when the said causes of action accrued to the plaintiff as aforesaid, to wit, on the day and year last aforesaid and on divers other days and times between that time and the commencement of this suit, within that part of this province formerly constituting the province of Upper Canada, and the plaintiff might have sued for the same, yet he did not sue for the same within six years thereafter, but to do so made default contrary to the form of the statute in such case made and provided, and this the defendant is ready to verify, &c.

Demurrer: The causes of the demurrer were, that the defendant shews

nothing sufficient to bring the plaintiff's demand within the Statute of Limitations, nor does he shew that the plaintiff has ever been bound by any statute or statutes from maintaining this action, or that he was bound to sue the defendant within six years from the accruing of the causes of action; and that notwithstanding the state of facts shewn by the defendant in his rejoinder, it was perfectly competent for the plaintiff to bring this action, so long as he has not personally been within the jurisdiction of this court since the cause of action accrued; and generally, that the Statute of Limitations does not apply to this case.

*D. G. Miller* for the demurrer.

The Hon. *S. B. Harrison*, contra.

ROBINSON, C. J., delivered the judgment of the court.

The defendant has not attempted to support his rejoinder by any reference to the text books or adjudged cases.

It would seem reasonable, indeed, that a plaintiff resident in England and transacting business in this country through an agent competent to represent him as a contracting party, should not retain—by reason of his own continual residence in England—the right of suing his debtor here at any distance of time however remote, upon the pretence that he cannot institute his suit without coming himself into our courts, whereas the fact undoubtedly is, that he could cause an action to be brought through his agent or by letter quite as conveniently as he can transact any part of the business out of which the debt has arisen; and there is an apparent absurdity in this case in recognizing the plaintiff's residence in England as a reason why he need not sue within six years or twenty, when he has in fact brought his action at last when it suited his convenience and without coming to this country.

The statute does in effect admit of this abuse, that a creditor being in England may wait his time till he knows his opponent's most important evidence is lost to him, and then can do what he might as easily and more justly have done within the proper time.

There is colour for the exception where the creditor may be supposed to have first acquired his knowledge of his right on coming within the locality; but in cases like the present, where his own act through his own agent in this country created the debt here, it would seem that the law might be placed on a more equal footing.

It is clear, however, that we cannot introduce any such amendments into the act, and that the plaintiff is entitled to judgment on this demurrer, for our Statute of Limitations is in the same terms with the English Act, and must be carried into effect as it stands.

*Per Cur.*—Judgment for the plaintiff on demurrer.

#### MARTER V. DIGBY.

*Quære.*—In an action of slander, as to the degree of certainty required in making the colloquium refer to the inducement.

The plaintiff, a surgeon, sued the defendant, also a surgeon, for slander.

The declaration contained three counts—to which the defendant pleaded the general issue.



In the first count it was averred, that the plaintiff had been called in as a surgeon, to attend upon one Alexander Sharpe, whose thigh-bone had been fractured; that he had treated the said Sharpe for the said injury in a skilful manner, and had among other things given directions for the making a fracture-box, for which there was no immediate necessity, on the occasion of his first visit, and had given directions that he should be bled in case of a return of pain before the plaintiff's next visit, it not being necessary to bleed him during the plaintiff's first visit; and that the plaintiff was requested by the father of Sharpe to attend again the next day, which he promised to do. The count then charged, that the defendant, maliciously intending to injure the plaintiff in his reputation as a surgeon, and to cause it to be believed that he was ignorant and unskilful, and had conducted himself negligently and injudiciously towards the patient, on, &c., in a discourse which he had with the father and mother of Sharpe and with divers other persons, "of and concerning the plaintiff in his said profession of a surgeon, and of and concerning his conduct in his said profession towards the said Alexander Sharpe, soon after the said visit of the said plaintiff, and before the time appointed for his next visit, falsely and maliciously spoke and published these false, scandalous and malicious words, &c. &c., of and concerning the plaintiff in his said profession, and of and concerning his conduct in his aforesaid profession towards the said Alexander Sharpe," that is to say, "he ought to have bled him and got the box made himself," (with proper innuendoes) "laying general damage to the plaintiff in his reputation as a surgeon; and as special damage, that in consequence the defendant was discharged from further attendance upon the said patient."

In the second count it was averred, that after the plaintiff had been discharged from further attendance as in the first count mentioned, the defendant was employed to attend upon the said Alexander Sharpe for the said injury, and did for a long time thereafter attend him for the same; that the defendant did not treat the said Alexander Sharpe skilfully or properly, and by reason of his negligent and improper treatment the thigh which had been broken became crooked and deformed, and the said Alexander Sharpe became greatly lamed and crippled, and not by any fault of the plaintiff; yet that the defendant, well knowing the premises, and maliciously intending to injure the plaintiff in his business as a surgeon, and to cause it to be believed that the state and condition to which the said Alexander Sharpe was so reduced as aforesaid, was in consequence of negligent and unskilful treatment on the part of the plaintiff, afterwards and at the house of the father of the said Alexander Sharpe, and in the presence of the said Alexander Sharpe, and while the said Alexander Sharpe was so lamed and crippled as aforesaid, in a discourse which the defendant had with, &c. "of and concerning the plaintiff in his business of a surgeon, and of and concerning the thigh-bone of the said Alexander Sharpe so broken as aforesaid, and of and concerning the state and condition of the said Alexander Sharpe, the defendant falsely and maliciously, &c., spoke of the plaintiff in his said profession of a surgeon, and concerning the treatment of the said Alexander Sharpe, and concerning the thigh-bone of the said Alexander Sharpe so broken as aforesaid, and concerning the state and condition

"of the said Alexander Sharpe, the following words, 'that is the way Dr. Marter always sets his bones,' meaning the bones of his the said plaintiff's patient, which had been or might be fractured or broken; and thereby meaning to have it understood and believed, that the state and condition to which the said Alexander Sharpe was so reduced as aforesaid, was in consequence of the negligent and unskilful treatment of the plaintiff as such surgeon during his attendance on the said Alexander Sharpe, as in the first count mentioned," and laying general and "special damage as in the first count."

The third count, without any particular introduction, charged, that in a certain other discourse which this defendant had on the same day and year last aforesaid, of and concerning the plaintiff in his said profession of a surgeon, and of and concerning the plaintiff's treatment in the way of his profession of the said Alexander Sharpe, and of and concerning the thigh-bone of the said Alexander Sharpe *so broken and fractured as aforesaid*, and of and concerning the state and condition of the said Alexander Sharpe, he the defendant, in presence of, &c., falsely and maliciously spoke the words following of and concerning the plaintiff in said profession of a surgeon, and of and concerning his treatment of the said Alexander Sharpe, and of and concerning the thigh-bone of the said Alexander Sharpe *so broken and fractured as aforesaid*, and of and concerning the state and condition of the said Alexander Sharpe, that is to say, "that is the way that damned Marter always sets his bones," (explaining the meaning as in the second count,) concluding with laying general damage to the plaintiff in his business and reputation as a surgeon.

The jury found for the plaintiff on the first and third counts, 125*l.*, and on the second count one shilling damages.

*H. J. Boulton, Q. C.*, moved in arrest of judgment on the first and third counts.

The objections taken to the declaration were, the want of any colloquium in the first count respecting the fracture-box and the bleeding of the patient. The laying the colloquium to be of the plaintiff in his profession, and of his conduct towards the patient, was objected to as being too general to answer the purpose of pointing out the meaning of the words charged, and connecting them with the ground of complaint which the plaintiff desired to establish.

And it was objected to the third count, that it was bad for want of proper words of reference to those indispensable statements in the preceding counts which were not contained in the third count, and without which that count, as it stood alone, must be clearly insufficient, as not shewing that the Alexander Sharpe mentioned in that count had had his thigh fractured, and that the limb was in that condition in which it must be understood to be, before such a meaning could be given to the words charged in the third count as could make them actionable.

*H. J. Boulton*, in support of these objections, cited 5 Scott, N. R., 801; 1 Stark. Libel, 346; new edition, *ibid*, 348, 367-9; 2 G. & J. 417.

*Read*, same side, 8 E. R. 1: 9 E. R. 93; 1 Saund. 243, a; 5 State Trials, 590, Tucker's case; 4 Coke, 20, a; 9 State Trials, 782; Sayer, 280; 1 C. & J. 143; 3 Buls. 83; 2 Esp. C. 624; 2 A. & E. 2; 3 Wils. 177; 1 C. & J. 301; Com. Dig. Ca. F. 8, 10; D. 18, 29.

The *Hon. R. B. Sullivan*, *contra*, in support of the judgment, referred

to 6 Bing. 409; 1 Saund. 241, note 3; 8 E. R. 427; 9 A. & E. 282; 4 M. & W. 834; 11 Moore, 344; 1 M. & W. 494; 4 M. & W. 204; 3 M. & P. 310.

ROBINSON, C. J.—There was much ingenuity in the arguments of the learned counsel who pressed the objections, but looking at this record after verdict, when we are not only at liberty but are bound to admit all reasonable intendments, I see no ground for a question upon the sufficiency of any of the counts.

The declaration, I think, has been carefully drawn and well framed, as regards the first two counts, to meet the case; and though the addition of a few words in the last count would have precluded any pretence for one of the objections taken, yet, as it stands, it is impossible that any person reading it can be in any doubt about the meaning.

There could be no colloquium laid in the first count about the fracture-box or the bleeding more particular than is laid, for the patient was not in fact bled, and the fracture-box was only directed by the plaintiff to be made, and the injurious words were, that he ought to have bled the patient, and ought to have got the fracture-box made himself.

No one can fail to see without further explanation, that these words were meant to condemn, and were calculated to disparage the plaintiff as having been unskilful and inattentive in his treatment of the patient. They are perfectly intelligible words in the connection in which they are used; if they were spoken in good faith, and as a sincere expression of opinion of the defendant as a surgeon called in to treat a case which had been badly managed by another, then no doubt being so spoken they would not have furnished ground for an action of slander: but the charge is, that they were spoken falsely and maliciously with intent to injure the plaintiff in his reputation, and the jury found that they were so spoken, and their verdict is not complained of as being unsupported by the evidence.

As to the third count, it is to be observed of that as well as of the others, that the substantial charge contained in it is, that the defendant maliciously defamed the plaintiff in regard to his treatment of *Alexander Sharpe's case*.

The particulars of the case are stated in the first and second counts, and when the plaintiff in the third count avers "that the defendant was "speaking of and concerning the thigh bone of the said Alexander "so broken and fractured *as aforesaid*," and "of and concerning the "state and condition of the said Alexander," how is it possible to understand otherwise than that he was speaking of his condition as having his thigh fractured in the manner before described?

Then when he used the words, "that is the way that damned Marter "always sets his bones," and when the plaintiff alleges that he meant thereby to impute negligent and unskilful treatment of the case, I do not see how we can refuse to admit the reasonableness of the construction which the plaintiff places upon the words.

It was for the plaintiff to satisfy the jury that he did mean to impute that; and so far from the words not being such as can support that meaning, they do more naturally import that than anything else.

I am of opinion, that whatever may be the merits of the case, upon the evidence there is no ground for arresting the judgment.



MACAULAY, J.—No objection appears to the second count, and of course the damages being assessed thereon separately, the judgment cannot be arrested on the whole declaration, and the question is, whether the plaintiff is also entitled to judgment on the first and third counts, on which damages are assessed jointly. I am of opinion that the first count is good, at all events after verdict.

If all relating to a fracture-box was omitted, and even the inducement respecting the bleeding, there would still remain a good cause of action, for it would then allege in effect that the plaintiff having treated the patient with due skill and care, the defendant maliciously intending to injure him in his profession, &c., in a discourse concerning the plaintiff in his profession, and his conduct therein towards the said patient, maliciously spoke these words of the plaintiff, &c.—“He ought to have bled him, and got the box made himself.” This is clearly disparaging in relation to the bleeding.

If the inducement on the same subject be regarded in connection with the words, such disparagement only appears the more clearly. The colloquium as laid was of and concerning the plaintiff in his profession, and of and concerning *his conduct therein* towards the said patient—that is, concerning the plaintiff’s conduct in relation to his directions respecting a fracture-box and bleeding the patient.

I therefore consider it sufficiently certain and pointed to include a reference to what is said in the inducement of the fracture-box and bleeding.

My only doubt has been upon the third count, which is framed in more general terms; each of the prior counts alleges a malicious *intention* on the defendant’s part to injure the plaintiff in his profession, but it is omitted in the third. It proceeds at once to state, that on the day and year last aforesaid, that is the day mentioned in the second count, in a certain other discourse which the defendant had concerning the plaintiff in his said profession, and the thigh-bone of the patient so broken and fractured *as aforesaid* (which relates to the inducement in the *first* count), and of *and concerning the state and condition of the said patient*, (not adding *as aforesaid* so as to refer to the inducement in the second count,) the defendant *maliciously* spoke of the plaintiff in his profession, and of his treatment of the said patient, and of his thigh-bone so broken and fractured *as aforesaid* (again referring to the first count), and of and concerning the state and condition of the said patient (omitting *as aforesaid* so as to refer to the second count), “that is the way that damned Marter always sets his bones”—innuendo—meaning the bones of his patients, which had been or might be fractured or broken, not introducing in the usual form innuendoes explaining what was meant by “that is the way,” or who was meant by “Marter,” or by “his bones,” but adding to the above innuendo the general averment of the *meaning or intention* of the whole passage thus, “and thereby meaning and insinuating that the state and condition “to which the said patient was so reduced *as aforesaid*,” (for the first time referring to the second count, if such be the object of the words “as aforesaid,” and not merely a reference to the state and condition previously mentioned in this count,) “was in consequence of the improper treatment of the plaintiff, during the time he had charge of the said patient as in the first count mentioned, and that the plaintiff was negligent and unskilful in his profession of a surgeon, &c.”

Now if the words do not in themselves bear this import, it is contrary to the settled rule touching the province of the innuendo to expand or apply the words otherwise than as sanctioned by previous inducement.

If the inducement to the second count, as well as to the first, can be referred to in construing the third count, it would be free from difficulty, and although I am not clear there is that close connection between the two as framed which will warrant this view, still I am by no means satisfied the reference to the *state and condition* of the patient in the third count is not after verdict susceptible of application to the inducement of second count, and if so, or if the reference on the same subject contained in the innuendo in the third count can be so regarded, I think it should be held good on motion to arrest the judgment.

Taken more strictly, and read in connection with the first count, the question is whether the words laid, found by the jury to have been spoken *maliciously*, are actionable *per se* as defamatory of the plaintiff in his profession without any innuendo. Had an *intention* to disparage been stated as in the previous counts, such effect might the more readily be given to them, but as it is, the question is whether these words being inadvertently spoken of the plaintiff in his profession and in relation to his treatment of the patient Sharpe, are actionable without more. Omitting the word "damned," I do not see that they would be so. To say "*that is the way Marter always sets his bones*" does not appear to me to be *disparaging* in its terms, without which the words would not be actionable—5 B. & Ad. 645; but the introduction of the offensive epithet gives a different force to the words, and evinces that they are spoken not in a commendatory or inoffensive, but in a disparaging or deprecatory spirit, and the jury have found that they were maliciously spoken.

On these grounds therefore, though not without doubt, I am disposed to think the count sustainable after verdict. Had the words "*as afore-said*" followed those referring to the state and condition of the patient, it would have been free from doubt (a), and although the meaning of the words cannot be extended by innuendo, still it is not clear that the *intention* of the whole passage may not be explained or indicated by a general statement such as has been made in this case. In *Williams v. Gardiner*, Maule *arguendo*, referring to *Harris v. French*, 1 C. & M. 11 (b), distinguishes between an innuendo, properly so called, and a statement of the defendant's *intention* in uttering the words; and *Patterson, J.*, and *Lord Denman, C. J.*, afterwards in giving judgment to a certain extent recognized the distinction. Other cases (though not for slander) also suggest a difference between an innuendo and inducement in the wrong place, as *Lewis v. Alcock*, 3 M. & W. 189-90; *Dunford v. Trattles*, 12 M. & W. 529-32, where *Lord Abinger* says, "there is no reason or principle why the inducement, as it is termed, should be at the beginning of a declaration rather than at the end."—See also *Francis v. Rosca*, 3 M. & W. 192.

Those cases however do not go the length of warranting the court in dividing an informal innuendo in actions for libel or slander, and treating one part as innuendo proper, and the residue as inducement misplaced—if

(a) 5 East. 463; *Woodsworth v. Meadows*, 9 East 93; 1 C. & M. 11.

(b) 2 C. M. & R. 78; 1 M. & W. 245-8; T. & G. 578.

they did, this third count would be free from difficulty in that view, because the statement of the defendant's design and intent in speaking the words which follow the charge of the words spoken, if admissible and entitled to be noticed on any ground, must be intended to be found by the jury, and would be quite sufficient to render the count unexceptionable.

Had they been inserted *before* the words, that is immediately after the reference to the state and condition of the patient, "and thereby meaning and insinuating, &c.," the count would have been unobjectionable. Some cases go far to support this count after verdict, as *Briant v. Sexton*, 11 Moore, 344; *Tindall v. Moore*, 2 Wils. 114; 2 Show. 77, Skin. 183; *Roberts v. Camden*, 9 East. 93; *Day v. Robinson*, 1 A. & E. 554-8; 5 East. 463; 1 C. & M. 687; *Hawkins v. Hawkins*, 8 East. 427; *Hughes v. Rees*, 4 M. & W. 204; *Morrison v. Cade*, Cro. Jac. 162; *Starkie on Libels*, 342-5.

Others however have a contrary tendency.—*Gompertz v. Levy*, 9 A. & E. 282; *Kelly v. Partington*, 5 B. & Ad. 645; *Edsall v. Russell*, 4 M. & G. 1090.

The plaintiff does not intend to leave the case depending upon the general import of the words, but by way of innuendo attributes to them a meaning referable to the inducement in the *second* count, which could not otherwise be ascribed to them, for without such reference they would rather relate to the first count only.—*Smith v. Cary*, 3 Cam. 461. But if the innuendo be admissible it is proved, and if it be rejected I am disposed to adopt the conclusion, that the words are in themselves disparaging, and having been found to have been spoken of the plaintiff in the way of his profession, in relation to his practice, on a special occasion and maliciously, are therefore actionable.

Were the count deemed bad, I apprehend the only consequence would be a *venire de novo* to assess damages on the first count separately, and not to open the whole case to a new trial.—1 A. & E. 554; 4 N. & M. 884; *Day v. Robinson*, 1 Saund. 195, b; 2 Saund. 171, (a); 11 M. & W. 720-4.

JONES, J.—Damages are assessed upon the first and third counts jointly, and also upon the second count distinctly. The application is made to arrest the judgment on the whole declaration—this cannot be done if the second count is unexceptionable; and as it appears that the first and second counts are undoubtedly good, the defendant cannot succeed. If the third count is bad, judgment might be arrested upon it; but the motion is not as to that count but to the whole declaration, and therefore unless the third count is clearly bad, the defendant should not prevail upon his motion, but should be left to his writ of error, if advised to bring one. But I cannot see that the third count is bad. The plaintiff alleges, that in a colloquium on the day last mentioned (which refers to the 10th of October, 1846), concerning the plaintiff in his *said* profession of a surgeon, and concerning his treatment in the way of his profession of the said Alexander Sharpe, and concerning the thigh bone of the said Alexander Sharpe so broken and fractured *as aforesaid*, (referring to the first count) and concerning the state and condition of the said Alexander Sharpe (referring to his then state and condition), he spoke the words charged, meaning to injure the defendant in his profession.



The words may be so understood, although without any explanation they would not be considered defamatory. The jury have found that they were spoken in the disparaging sense as set out, and I think the count sufficient.

The reference to the treatment of Alexander Sharpe is to the setting of the bone as stated in the first count, and it appears to me that by the references in this count to the preceding averments in the other counts, the whole is perfectly intelligible and sufficient. I see no reason why any statements in the innuendo which may help the plaintiff should not be taken in the same manner as if set out in the first part of the count as inducement.

McLEAN, J., being in the Practice Court during the argument, gave no judgment.

*Per Cur.*—Rule discharged.

---

LANE ET AL. V. SMALL.

To a plea of the Statute of Limitations, the plaintiffs replied absence beyond seas when the action commenced; to this the defendant rejoined, that after the making of the promises, &c., and upwards of six years before the commencement of this suit, viz., on, &c., he the defendant was at London in England, &c., where the plaintiffs then resided, and continued there for ten days, of which the defendant had notice; and that the plaintiffs did not commence their action within six years after he returned to Upper Canada; to this the plaintiffs demurred. *Held*, demurrer good.

Declaration on the common counts, for goods sold and delivered, for interest, and upon an account stated.

2nd plea, non assumpsit *infra sex annos*.

Replication to second plea, that when causes of action accrued to plaintiffs they were in parts beyond the seas, and did not return to Upper Canada.

Rejoinder, that after the causes of action had accrued and promises made, defendant was in London and remained there for ten days, of which the plaintiffs had notice, and that plaintiffs did not commence this action within six years after the defendant had returned from London, &c.

Demurrer to rejoinder, that the defendant shewed no state of facts sufficient to bring the case within the Statute of Limitations; that it was not alleged that the plaintiffs could have served the defendant with process, or sued him at the time he was stated to have been in London.

The *Hon. S. B. Harrison*, for the demurrer.

The *Hon. J. E. Small*, contra.

ROBINSON, C. J., delivered the judgment of the court.

In this case, to the Statute of Limitations, the plaintiffs replied that they were absent beyond seas when the action commenced, viz. in London, &c., and that they had never since nor had either of them been or returned into this province. The defendant rejoined, that after the making of the promises, and upwards of six years before the commencement of this suit, viz. on, &c., he the defendant was at London, in England, where the plaintiffs then resided, and continued there for ten days, of which the plaintiffs had notice; and that the plaintiffs did not commence their action within six years after he returned to Upper Canada. To this the plaintiffs demurred.

The defendant has referred to no adjudged case which will support his rejoinder, and we cannot narrow the privilege which the legislature has conferred upon absent creditors, by holding them bound to commit themselves and their contract to the jurisdiction of any country in which they and their debtor may happen to meet. The case cited of *Williams v. Jones*, 13 E. R. 439, is as strong an illustration as could be given of the obligation which the courts in England feel themselves under, of allowing to the plaintiffs literally and to the full extent the benefit of the exceptions contained in the statute. We should be legislating, if we were to introduce this modification into the act, for there is no difference between the provisions or language of our Statute of Limitations, 7 Will. IV. ch. 3, s. 4, and the English Statute.

*Per Cur.*—Judgment for plaintiffs on demurrer.

---

DOE DEM. MCPHERSON V. HUNTER.

A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors and *voidable as to them*, is nevertheless, as between the lessor and the lessee, a merger of the lease, or more properly a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land, to immediate possession.

*Quære.*—As to the right of the purchaser at sheriff's sale to set up the deed in the first place as *valid*, *quoad* the lessor and lessee; and then in the second place to repudiate the deed as *invalid*, *quoad* the execution creditor.

Where a party purchases land upon which a judgment has attached, he holds the land, subject to a right of sale under a *fi. fa.* by the judgment creditor.

Ejectment for Lot No. 91, in the town of Kingston.

The plaintiff made title, as purchaser of the land upon a sale under a *fi. fa.* against Allan McLean, Esq., at the suit of the executors of one Vincent.

Judgment was entered in that suit on 4th of June, 1830, and a writ of *fi. fa.* had issued upon it, to which *nulla bona* was returned. Vincent having died, the suit was revived upon a *sci. fa.* brought by his executors, in which judgment was entered and docketted 8th of March, 1843, and a *fi. fa.* against goods issued on the same day, which was returned *nulla bona* in July following: and upon a *fi. fa.* then taken out against the lands of the defendant, the land in question was sold to the lessor of the plaintiff together with other lands on the 7th of September, 1844, and a deed executed on the 16th of September, 1844, registered on the 6th of May, 1845.

It was proved that Mr. McLean had been in possession of the lot for many years before the sale, and that this defendant had gone into possession under him a few years before the sheriff's sale, living on it as his tenant and acknowledging his title.

In order to shew the defendant had acknowledged Mr. McLean's title, the plaintiff proved a conveyance made by him to the defendant, bearing date on the 8th of May, 1843, but shewn to have been executed in May, 1844, for a consideration expressed of 600*l.*, and to have been made out then and intentionally ante-dated, in consequence of the unsuccessful issue of a suit between Mr. McLean and one Manahan, in which a verdict had been just before rendered.

On the defence a lease was put in and proved, by which Mr. McLean, on 3rd May, 1841, demised this lot of land to the defendant for twenty-one years from the 1st of May, 1839, at a rent of thirty pounds, in which a covenant was given by Mr. McLean, that he would at any time during the term, at the request of the lessee and on payment by her of 600*l.*, convey to her the land in fee simple; this lease was not registered till 31st May, 1844. The defendant did not put in or prove any other title than this lease, but relied upon that as giving her a right to possession till the expiration of the term. It appeared upon the evidence of her own witness, that a deed, afterwards made to her in fee simple and of which the plaintiff had given evidence, was given to her for the purpose of enabling her to set up a fuller title than she could claim under the lease, in consequence of the unfavourable issue of the suit of *McLean v. Manahan*. The defendant attempted to give in evidence a patent from the crown to a third party to this land issued in 1847, but the learned judge rejected it on the ground, that the defendant having taken the lease in 1839 was estopped from denying that Mr. McLean was then seized; and the jury were directed, that the defendant having taken the lease in 1841 from Mr. McLean had thereby acknowledged his title, and that when she afterwards in 1844 took from him a conveyance in fee of the same land, the term was thereby extinguished, though the defendant could not hold under it as against a creditor or subsequent *bona fide* purchaser for value, if the deed was as it appeared to be voluntarily and fraudulently given for the purpose of defeating creditors.

The jury upon this charge found for the plaintiff.

*McKenzie* and *Read* moved for a new trial without costs, upon the law and evidence and for misdirection, and on account of the admission of improper evidence; they cited 2 Atk. 524; *Burton on Real Property*, 287.

*Henderson* shewed cause, and referred to 9 M. & W. 596; 9 A. & E. 649; 11 A. & E. 128; 2 Flintoff, 34; *Cooper*, 117; 2 B. & Ald. 367; 10 Bing. 182; 6 Dowl. 536; 11 A. & E. 859.

ROBINSON, C. J.—There can be no doubt, in my opinion, that the view taken of this case by the learned judge at the trial was correct, and that the verdict was rightly given for the plaintiff.

Of course, if no such deed as that dated May, 1843, had been made to the defendant, then the sale under the execution could not have prejudiced her right of possession for the remainder of the term for which the land had been leased to her, and the only effect it could have had upon her interest would have been the changing her landlord; but the accession of the fee to her while she was tenant for years must on general principles of law have extinguished the term, since the greater and lesser estate could not be at the same time united in the same person.

It has however been objected for the defendant, that the principle does not operate in this case, because if the conveyance in fee was, as the lessor surmises, a mere voluntary conveyance intended to defeat creditors, no estate passed by it, and being merely void it could not have the effect of creating a merger of the previous estate of the defendant under the lease, but as regards its operation between the grantor and grantee the deed of the fee was not void, it was merely voidable at the instance of a creditor. Except that it could form no obstacle to the remedy of a



creditor, and must be laid aside when his claim appeared, it was a perfectly good deed, and if as between the parties it could operate for an instant, it must have had the effect of extinguishing the term for years, which could not in such a case be set up again, on account of the deed being afterwards adjudged void at the instance of a creditor.

I consider that this defendant stands in the same situation as she would have stood in if she had never registered her deed, and the grantor had subsequently conveyed to a stranger, who would have gained a title by registry. Such registration of a subsequent conveyance would have made the defendant's title in law fraudulent and void *as against the subsequent purchaser*, but in no other sense void, and neither in such a case nor in the one before us would the term be revived.

No doubt, in some cases, the term has been held to be suspended merely by the union for a time of the fee, and to be revived again by the interest under the second deed ceasing; but those are cases of a wholly different nature, as where the greater estate has ceased in consequence of a default in a condition which one party has entered into for the benefit of the other, and not in a case like this, where the estate is to be held void only for the purpose of letting in the claim of a third party, and from a cause which neither party to the deed can advance as an objection to it.

The deed purporting to convey the fee was undoubtedly perfected and delivered in this case; it was executed by the defendant as well as the grantor, was accepted by the defendant and recorded, and everything done which both parties could do to give it validity, if they should think it expedient to set it up; and that they meant to keep it secret, and use it as a mere instrument of fraud, if at all, is not a reason which can be received from either party to the deed for preventing the estate vesting.

The deed undoubtedly had its full effect between the grantor and grantee; it was not as between them void, though voidable at the instance of a creditor; and in *Doe dem. Earl of Berkely v. The Archbishop of York*, 6 E. R. 102, it is treated as a point well settled, that the acceptance of a voidable lease is a surrender of a previous term, though the acceptance of a void lease is not.

When this deed was given it was uncertain whether any creditor would ever impeach it, or have occasion to impeach it; if the judgment under which it was sold had been paid off, as it might have been, from other funds, then for all that appears this defendant would have been undisturbed in her possession of the fee, and in that case, and indeed during the time that her right under the second deed was undisputed by any creditor, there can be no pretence for saying that the grantor could have distrained for rent as if the relation of tenant were still subsisting, and that relation being once destroyed by the voluntary act of both parties it cannot subsist again till it has been created anew.

But the defendant's counsel, if I understood him right in one part of his argument, contends, that the evidence of the conveyance in fee, being adduced not by the defendant but by the plaintiff to answer his own purpose, he must be taken to assume the validity of the conveyance, and that the estate passed by it. All that he need shew however was, that as between Mr. McLean and the defendant the estate must be taken to have passed, so far at least as to have merged the term.

But the defendant has clearly no ground in any view to stand upon, because the *fi. fa.* against lands must have been in the sheriff's hands before the deed was in fact executed, and so the judgment must have attached upon it and would prevail against the deed.

The defendant no doubt was conscious of that, for she rested her defence upon the lease alone in the first instance, and having done that the plaintiff contends she was not at liberty to change her ground, and endeavour to maintain her possession as owner of the fee under the deed which the plaintiff proved. It is not under such circumstances, I think, this rule applies. The defendant did not open a new case properly speaking, but the plaintiff having met her case by putting in and proving the conveyance in fee in order to shew her term extinguished, the court could not refuse to look at the effect of the two deeds in evidence before them, and were driven to say where the title to the possession rests.

Then the result as it seems to me is this:—the title must be taken to have been at one time in Mr. McLean, from whom both parties claim. Then in July, 1843, when the *fi. fa.* against his lands was placed in the sheriff's hands, it attached on this estate, and made it the sheriff's duty to sell whatever interest he had in it if it was more than a chattel interest. He did accordingly, in *September*, 1844, sell all Mr. McLean's interest, which would then have been the reversion in fee if the term were still subsisting. The term had been created in May, 1841, and would have had yet many years to run if it had not been extinguished, but between the delivery of the writ to the sheriff in July, 1843, and the sale in September, 1844, namely, in May, 1844, the defendant took that conveyance in fee from the landlord, which I consider to have extinguished her term, and so when the sheriff sold all the landlord's interest, he sold the present estate instead of a mere reversion.

It was argued, that the land being bound by the writ in July, 1843, the debtor could not make a deed which would affect the title. He could not make a deed which would defeat the creditor's lien, it is true, but subject to that lien he could deal with the property, and that has been decided to be the whole effect of the execution in regard to chattels, as it must be also on the same principle in respect to real estate.

With respect to Mr. A.'s evidence, it does not seem to form an indispensable part of the testimony, for what he proved was proved by another witness, and was not attempted to be disproved, as I wish indeed it could have been, for I am sorry to see the name of any gentleman of the profession mixed up with such a transaction as the giving of the deed dated in May, 1843, was, by Mr. A.'s account of the matter. And besides, if the deed were to be taken as having been made in May, 1843, according to its date, and not in 1844, according to the truth, then it would follow, that before the *fi. fa.* issued the term was merged; and the judgment creditor coming afterwards with his writ and insisting on his remedy, had a right to treat that deed as fraudulent against him, leaving it as he must to have its full effect between the parties to it, and he was thus in my opinion at liberty to sell the land as being still the estate of Mr. McLean, made so by the statute for the purpose of satisfying his debt; and this I take to be the position in which the parties should be held to stand, whether Mr. A.'s evidence had been received or not, for when once it is pretended by the defendant, that the deed was really meant to take effect from the day of its date and was then executed, not alleging any

mistake or mere delay in execution, we should take it as against him to be really made then.

There are many cases in the books, in which, where a lessee has accepted from his lessor a conveyance of the fee, such a conveyance has been held to operate as an extinguishment of the term, not merely on the ground of its being merged upon the union of the greater and lesser interest in the same person, but also on the principle of surrender of the term, for it is said, that by accepting a deed purporting to convey a present estate in possession, he admits the grantor to be in a position to transfer such estate, which he could not be unless the right of possession under the term had been given up.

But there is in this case another feature, which leaves in my opinion no possibility of doubt; the lease which the defendant took contains a condition, that if she, the tenant, should at any time during the term desire to acquire the fee, she might do so on payment of 600*l.*, and that then the lessor would make a title to her in fee. When therefore the defendant took from the lessor, in May, 1844, a conveyance in fee to which she is an executing party, in which it is acknowledged that the purchase money, 600*l.*, was paid, she surely must be held to have put an end to the relation of tenant. All that can be said is, that there was in fact a lien upon the estate in favour of creditors; if she had paid off that debt, or if it had been in any other way discharged, then her estate, which undoubtedly she took till the creditor intervened, would, for all that we can notice in this case, have been undisturbed and permanent. By the sheriff's sale she loses it, but she has a remedy as other purchasers have on the covenants in her deed, and if they should produce nothing it would be no reason for setting up the term again. She was not deceived nor misled, nor did she compromise herself under the lease in ignorance of some concealed fact; on the contrary, she deliberately concurred with her lessor, as the evidence shewed, in destroying the term, in order that she might be able to set up an absolute estate in herself, with a view of defeating a proceeding against her lessor by another party, which was then pending.

It would be strange indeed, if, having thus disposed of her term advisedly and deliberately, she could afterwards take advantage of the transaction in which she was concerned as *particeps criminis*, being void by law, and revert to her former position as tenant. The case was in my opinion clear against the defendant.

MACAULAY, J.—I was under the impression at first, that this case depended upon the question, whether treating the deed of the reversion in fee from McLean to the defendant as fraudulent and void against creditors, under one of whom the lessor of the plaintiff, as sheriff's vendee under a *fi. fa.* against McLean's lands, claims, it could nevertheless be set up by the plaintiff as a part of his case, in order to shew a merger of the defendant's former term for years otherwise subsisting, and then to shew it void in order to acquire the whole estate in fee under the sheriff's sale, with a right to immediate possession; and, if this were the case, I am not satisfied that the plaintiff can adopt such a course, or that, if the plaintiff's lessor treats the deed as fraudulent and void *quoad* her right as purchaser from the sheriff, she can rely upon it as working a merger; in other words, adopt it in part and repudiate it in part at one and the same time.



It would be contrary to the general rule, that a party cannot adopt that part of a deed which is beneficial and reject that which is against his interest—but must adopt or reject it *in toto*. But on reference to the evidence given at the trial, it appears that in point of fact the *fi. fa.* was in the sheriff's hands long before and at the time the deed of the fee was executed by McLean to the defendant, but that a year from its receipt had not expired, so that he could not regularly have sold McLean's reversionary estate at that time, but did so afterwards. Under these circumstances, it is perhaps the soundest conclusion that in point of law the term did merge. The estate passed from McLean to the defendant, so that the two interests (the one for years and the other in fee) united in her; whereupon the less became merged in the greater estate. In this view the plaintiff does not seek to invalidate the deed as void against creditors, but treats it as perfectly good; with this condition, that when the reversion passed to the defendant it was charged with the debt of McLean by virtue of the *fi. fa.*; and that the defendant having voluntarily accepted the conveyance in fee (whether from fraudulent motives or *bonâ fide* upon an actual payment of 600*l.* would be immaterial), she took the estate clogged with the charge; that such charge would not prevent the estate passing or the term merging; but the consequence followed, that whereas the defendant previously held an interest in the term for years not liable to the charge, she afterwards held the estate in fee liable to it; and that, as she did not pay it off, so as to relieve the estate, the same was legally saleable to satisfy it, and that the whole estate passed: that the reversion, owing to the merger of the term, had become one estate in possession, without any term longer subsisting to prevent it—wherefore the sheriff's sale attached upon and conveyed the whole interest to the plaintiff.

This view is to a certain extent sanctioned by what is said in Mr. Preston's work on Merger, title *Elegit*, page 112-178, where tenant by *elegit* accepts a confirmation for the term of his life, he is in by the tenant of the freehold, and not in by act of law as he was before; and a consequence flowing from this deduction is, that if the tenant of the *freehold* has charged the land between the execution made on the extent and the confirmation, the tenant by extent accepting the freehold shall hold charged, notwithstanding he was discharged while he held under the extent.—Bro. Extingt. 30-31; Ass. Pl. 13.

So where tenant by statute merchant or of the like interest brings an assize, and pending the writ the fee simple descends to him, the writ will be abated—for the descent of the greater estate extinguishes the lesser.—Bro. Extingt. 56, and 32 H. 6, 30; Idem, Brief, 419; (see Co. Lit. 338, b.)

And it is to be added, if a tenant by extent purchase the inheritance of part of the lands extended, the whole falls; this is partly on the ground of extinguishment, and not merely and simply under the law of merger—Hayden & Vavasour v. Smith, Moore, 662; and not so where lessee for years purchases the reversion of *part*, for the lease holds for the rest.—2 Vent. 327; (see Plow. 107; 1 Inst. 218; Dyer, 140, pl. 43; 2 Roll. Abr. 495.)

But in such cases it is clear, that the party entitled to enforce the charge proceeds in perfect consistency with that which works the extinguishment, and in short seeks to uphold and enforce it.

In ordinary cases of a judgment in England against a reversioner having previously demised for a term of years, the course is to extend a moiety of the reversion or a moiety of the rent; and I apprehend it would follow from what is mentioned above, that if the tenant was in such a case to acquire the fee simple after judgment, and after the reversion had become charged and before the *elegit* had issued, that the judgment creditor would be entitled to extend a moiety of the estate in his hands, irrespective of the rent or the reversion as distinguished from the lease.

The application of a similar rule to the present case may sustain the present action, and as my brothers are clear upon the point I am led to believe that it must be so. Viewed in the light of a fraudulent conveyance, and as such void against creditors, I should still doubt. In Roberts on Fraudulent Conveyances, page 381, (4), I find the following remarks; "it seems to have been the learned sense entertained of these statutes, that they render conveyances void to such purposes (meaning merger)—Hob. 166, and to such extent as may be necessary to accomplish their object. If a merger be *necessary* in any instance to their efficacious operation, (as it might have been in Burrell's case, which see, 6 Rep. 7266,) if the statute had been construed only to operate on the assignment, they must be taken as it should seem to cause an avoidance to the extent of effectuating the merger. On the other hand, in the case of Thorne v. Newman, 2 Chan. Rep. 37, where an estate of freehold under a voluntary deed was attempted to be set up in the person from whom the leasehold estate had been purchased, whereby it was contended that the chattel interest was merged, and so not in existence to pass by the assignment to the purchaser, such voluntary conveyance was declared void, both at law and in equity, against the purchaser of the lease, and the merger (if a merger it could be; *vide* the case and compare it with Platt v. Sharp, Cro. Jac. 275,) was suspended." The difference between the case of Thorne v. Newman as there stated and the present case is, that there the purchaser (or as here the creditor or plaintiff) sought to destroy the deed of the freehold in order to prevent a merger, while here the party plaintiff would seek to set it up in the first place in order to accomplish a merger, and then to defeat it in the second place in order to obtain the whole estate without any suspension, in short to suspend the operation of the deed of the reversioner, but not suspending the merger, to which perhaps the term would not strictly apply.—See Preston on Estates, title Surrender, and Com. Dig. same title, and title Suspension.

There is no doubt much force in the argument that the deed is not void, but voidable only, at the election of the execution creditor of McLean, on the principle of the case in 6 East. 86, *Roe ex dem. Berkely v. Archbishop of York*, and 2 Smith, 166.

The difficulty I perceive is, where the same party seeks to treat it as valid for one purpose yet void as to another: valid between the immediate parties to pass the estate and work a merger, yet void as against a creditor without suspending or reviving the term. There is a case of mortgagor and mortgagee in 3 Lev. 6, case 17. The lessor mortgaged his reversion in fee to the lessee for years, and at the day, the money was paid, and it was holden that the lease for years was not revived, but

utterly extinct; it is not however quite analogous—See Com. Dig. titles *Surrender*, M. &c., and *Suspension*; 5 Preston on Estates, ch. 2.

Co. Litt. 3385, b.—If a bishop be seised of a rent charge in fee, the tenant of the land enfeof the bishop and his successors, the lord enter for the mortmain, he shall hold it discharged of the rent, for the entrie for the mortmain *affirmeth* the *alienation* in mortmain, and the lord claimeth under his estate, but if the tenant for life grant a rent and afterwards enfeof the grantee, and the lessor enter for the *forfeiture*, the rent is revived, for the lessor doth claim *above the feoffment*—See ib. 339, note 4, Cro. Car. 101. So it may possibly be said here, that the plaintiff claims *paramount* the surrender, owing not to an older or higher title, but through a prior charge upon the estate in the hands of the reversioner, McLean—See also the Statute of Uses. The conversion is conveyed by a deed of bargain and sale to the defendant's use.—See Preston on the Quantity and Quality of Estates, ch. 14, page 446-54, as to the effect of merger on the parties and strangers.—4 Mod. 1; 1 Inst. 133, 338; 4 Bro. P. C. 594; 2 Bul. 42.

I therefore think the defendant's lease was merged, but that the estate remained liable to the debt.

JONES, J.—The question is, whether the lease for years from McLean to the defendant was merged in the deed in fee subsequently executed by McLean to the defendant, who was at the time in possession of the term.

Merger is where a greater estate and a less coincide and meet in one and the same person without any intermediate estate, in which case the less is *immediately annihilated*, or in the law phrase is said to be merged, that is, sunk or drowned in the greater, as if the fee comes to the tenant for years or life the particular estate is merged in the fee.—Rep. 60, 61; 3 Lev. 437.

It is clear that this is a case of merger, and the term for years on the execution of the deed in fee was immediately annihilated. But it is contended, that inasmuch as the deed in fee (being made in fraud of creditors) must be regarded as void against creditors, the estate of the defendant under the lease is revived. I see no authority for so holding, and it is impossible in reason that such should be the case, if upon the execution of the deed in fee the term was *annihilated*. I so held at the trial, and I can find nothing to satisfy me that I was wrong.

*Per Cur.*—Rule discharged.

---

#### MCGILLIVRAY V. KEEFER.

A promissory note given by A. to B. for a debt due by C. upon no consideration of forbearance, and upon no privity shewn between A. and C., cannot be enforced.

Demurrer.

The plaintiff declared on a promissory note made by the defendant 31st of December, 1845, whereby he promised to pay to the plaintiff 27*l.*, fifteen days after date.

The defendant pleaded as his defence, that one Colter was indebted to the plaintiff before this action was brought, viz., 31st December,



1845, in 27*l.*, for goods sold and delivered by the plaintiff to him, which money was to be paid to the plaintiff in thirty days thereafter; and that when this note was made Colter stood indebted to the plaintiff in the said 27*l.*, payable as aforesaid; that the plaintiff, after Colter became so indebted, and before the making of the note, *applied to the defendant* for payment of the said 27*l.*, whereas, in compliance with the plaintiff's request, defendant, in *respect of Colter being so indebted*, and for no other consideration whatever, therein made and delivered this note to the plaintiff.

And the defendant averred, that the note became due before the money in which Colter was indebted was payable, namely, 15th of January, 1846, and that there never was any consideration for the note except as aforesaid.

This plea was excepted to on several grounds specially assigned, but the question on the agreement was reduced to the substantial one, whether a promissory note given by A. to B. for a debt due by C., upon no consideration of forbearance and upon no privity shewn between A. and C., could be enforced.

*H. Eccles*, for the demurrer, cited *Strange*, 264; 4 D. & R. 211; *Chitty on Bills*, 73, 74, note x.

*J. H. Hagarty*, contra, cited 4 M. & W. 795; 17 M. & W. 464; *Byles on Bills*, 92; 3 *Chitty's Plead.* 153; *Story on Pro. Notes*, sec. 183, *et seq.*

ROBINSON, C. J.—The form of this plea is taken from that of a plea in a case of *Nelson v. Serle*, 4 M. & W. 795. The differences between that case and the present are—1st, that there the debt due by the third party was in arrear when the note was given; according to the statement here it is expressly shewn that the debt was not yet payable, and no consideration of forbearance could therefore possibly arise, if that, or some other consideration, were necessary—and 2ndly, in that case the original debt had been due by a person who was dead and intestate, and so there was actually no person owing the debt when the note was given. In that respect it resembled the case of *Jones v. Ashburnham*, 4 E. R. 455, but the latter was not the case of a promissory note as this is, and as *Nelson v. Serle* also was.

The case of *Nelson v. Serle* was decided in Error, overruling a judgment of the Exchequer. If that case is to be treated as deciding, that a promissory note given by A. for the debt of B. is invalid, it seems difficult to reconcile it with the opinions expressed upon very good authority.

The peculiarity in that case was, that there really was at the time no debt due by any one. In that respect it was like *Jones v. Ashburnham*, except that the latter case was not on a promissory note.

I confess I have always been under the impression, that to support a promissory note, even as between the maker and payee, the debt of a third party would be a good consideration—*Popplewell v. Wilson*, *Strange*, 264, decided that point in Error. *Coombs v. Ingram*, 4 D. & R. 211, seems to accord with that, and any one reading either Mr. Justice Bailey's or Mr. Chitty's *Treatise on Bills* would not derive from either the impression, that the debt of a third party is not a good consideration to support a note without more being shewn.

It is true that it is shewn by the plea that there was no agreement of forbearance, and none *implied* in the nature or from the effect of the transaction; on the contrary, the payee was to get this money sooner by it.

If it would make any difference, that the defendant had been induced by Colter's request, or at least that he had not given the note without his knowledge or assent, then the contract is not as asserted in this plea, and in favour of this kind of mercantile security a consideration will *primâ facie* be presumed; it would seem to follow that nothing is to be presumed that would affect the sufficiency of the consideration, but whatever would have that effect must be shewn.

When one sees how long it was debated, whether a note or bill intended to be a mere gift to the payee could not be enforced, and reads the arguments and judgments in those cases, it is difficult to say that a note given for the debt of another should not be binding.

I think it is generally if not universally understood to be so, and it seems to have been assumed in *Baker v. Walker*, 14 M. & W. 464.

But certainly the law, where the point has been examined, seems to be, that a consideration of some sort is necessary to support the promise made in a promissory note, even as between the original parties, and on this record none appears, for the statement amounts only to this, that the defendant was requested by the plaintiff to give his note on account of another man's debts, without any stipulation of forbearance towards the original debtor, and without agreeing to discharge that debtor, and without any privity with him, and that he did on such request make the note.

Though I have doubted much on the point, that is the conclusion, I think, to which a careful examination of the point leads, and I agree with my brothers, that the defendant is entitled to judgment on this demurrer—See *Story on Promissory Notes*, 183, *et seq.*

MACAULAY, J.—It appears to me the plea shews the note to have been given without consideration; if given at the request of the plaintiff's debtor, it should be so averred; as stated it is *nudum pactum*. There is no promise of forbearance by the plaintiff or any request by his debtor. If the debtor was to give such security and requested it, it should have been averred.

JONES, J.—The debt of Colter to the plaintiff, in respect of which this note was given, was not due till the 30th January, 1846, nevertheless the defendant, at the request of the plaintiff and not at the instance of Colter, nor upon the discharge of the said Colter for his debt, but as a mere voluntary act on his part and for no other consideration, gave the note for the amount of Colter's debt, payable on the 15th January, 1846. These facts shew a total want of consideration for the note, and the defendant must have judgment upon the demurrer.

There must always be a good consideration for the giving of a promissory note to the maker and payee; such consideration is *prima facie* admitted by the note, but nevertheless the maker, as Colter himself, and the payee, may impeach the note by shewing that there was in fact no consideration, or no such consideration as would support any contract not under seal.

The case of *Jones v. Ashburnham*, 4 E. 455, was decided against the plaintiff, because there could be no forbearance detrimental to the plain-

tiff, there being at that time no person liable to be sued for the debt for which the defendant had voluntarily given his note. Here there was in fact no forbearance given to the defendant or the original debtor, but the payment was accelerated; therefore there was no consideration of forbearance, nor any other that I can see; and the case cited, 4 M. & W. 795, is to the same effect as Jones v. Ashburnham.

In Popplewell v. Wilson, 1 Stra. 264, it is determined in error, that a promissory note given by A. to pay a certain sum to B., for a debt due from C. to B., is a good consideration, and according to the letter of the judgment, that case would decide this note to be good. The circumstances are not stated, and I apprehend from the later decisions it would not be considered a sufficient consideration, when it is shewn in the pleading, that there was no privity between the original debtor and the maker of the note, nor any forbearance given, but on the contrary, the payment of the original debt accelerated.

In the case of Ridout v. Bristow et al., 1 Tyr. 84, Bayley, J., says, "there is no implied benefit in undertaking to pay the debts of another, and a simple promise to pay such a debt, where the party is under no legal or moral liability to do so, is reasonably held to be *nudum pactum*."

In sec. 186, Mr. Story says, "a valuable consideration consists, either in some right, interest, profit or benefit, accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility, or cost or labour or service on the other side."

*Per Cur.*—Judgment for defendant on demurrer.

#### RITCHEY V. THE BANK OF MONTREAL.

*Quære.*—As to what is *extra work* under a contract, and what *extra work* beside a contract.

The plaintiff sued in debt on simple contract on the common counts for work and labour and materials, for money paid for defendants, and on an account stated.

The defendants pleaded; 1st, *nunquam indebitatus*, 2nd, payment, 3rd, a special plea which was demurred to, under which the plaintiff had judgment.

The plaintiff was a builder, and on the 7th of November, 1845, he contracted by agreement under his seal to build a house for the defendants to be occupied by them as a bank, and to be according to the specification annexed, for which the defendants agreed to pay him 2983*l*. The contract bound the plaintiff to erect and finish the buildings "*proposed to be erected as aforesaid* (i. e. according to the specification and plan,) of good materials and in a workmanlike manner, and to perform all the matters and things mentioned in the specification thereto annexed and in the plans and drawings referred to, *including whatever may be necessarily implied* though not particularly mentioned, to the satisfaction and under the inspection and direction of the architect appointed by defendants to superintend the same." And the plaintiff agreed "to find all the materials and labour which should be requisite or necessary to be used or employed or applied in or about



*"the works covenanted and agreed to be done, and all matters and things incident thereto."*

It was provided, "if any of the works thereby intended to be contracted for, or matters relative thereto, were not fully detailed or explained in the said particulars of drawings, the plaintiff should apply to the defendants' architect for such further detailed explanations as should be necessary, and that in case any addition to or omission from the said drawings and specifications, or any alteration or deviation therefrom should be made in any *part* of the *said works* by the orders of the defendants or their architect, it should not in any manner make void or impeach the contract, but the value of every such *addition or omission or alteration* should be ascertained by the architect in charge by admeasurement and valuation, and such value when ascertained by him (and his decision to be final) was to be either added to or deducted from the said 2983*l.*, as the case might be."

"And that all instructions for any additional works or omissions or alterations, to, from, or in the said works, and particularly contained in the said specifications, drawings and plans should be received from the architect in charge only, in writing under his hand. And that from the commencement to the completion of the said works thereby agreed to be done, the plaintiff should take upon himself the whole care and management of the said works and of everything appertaining thereto, subject to the superintendence of the architect."

The whole of the work was to be completed and delivered up to the defendants within fifteen months, or the plaintiff should pay 20*l.* per week as liquidated damages, to be deducted from the 2983*l.*

The defendants covenanted "to pay the 2983*l.* at the rate of eighty-five per cent on the value of the work executed, but only upon the certificate in writing of the architect, and no certificate to be given for any sum less than  $\frac{1}{8}$  of the amount of the contract."

And the said work should be completely finished, and all additions and omissions (if any) adjusted and ascertained, and the true, ultimate balance settled and certified by the architect, then the defendants were to pay the balance of the 2983*l.* in two months from the completion of the said works.

The specifications annexed gave minute details of the building in all its parts, and at the end were general observations, which seemed intended to keep in view mainly what had been more formally provided in the agreement, viz., "the works to be executed strictly in accordance with the drawings and to the intent and meaning of the specification, comprehending what may be necessarily implied though not particularly mentioned."

"No extra work will be allowed for in any case unless with the written direction of the architect, and in all cases of dispute, as to quantity, price, &c., his decision to be final and conclusive."

"No additions, omissions or alterations to have any effect in invalidating or annulling the contract."

"No payment to be made to the contractor unless on the certificate of the architect of the value of the work executed."

While the work was in progress, the defendants wished to have an ornamented entablature of cut stone-work exhibiting the bank arms put

up in front of the building, and called for proposals or tenders for the work. The plaintiff put in a written proposal to do the work for 60*l.*, and it was accepted; but when the model came to be made, the workman represented, that to look well the letters should be raised and not sunk as intended in the architect's drawing upon which the plaintiff's proposal was framed, and also that some foliage should be added. This was stated to the defendants' architect, who sanctioned it and the work was done accordingly; at the conclusion an additional charge was made of 6*l.* 10*s.*, which the defendants objected to pay. The plaintiff's foreman swore, that this entablature was a job quite distinct from the contract; the building was up and roofed in before it was undertaken.

Then after the building was up, the defendants determined to have a hot-air furnace for heating the building, nothing of which was contemplated at the time of the contract, or in any way alluded to in the specifications. At the desire of the defendants the plaintiff employed one Mills, a patentee of hot-air furnaces, to put one in, and their architect told the plaintiff he must have the work done under Mills's direction. It was accordingly so done, and charging by days' work according to the actual expense, it came to 29*l.* 10*s.* 6*d.* The work could not be estimated by admeasurement after its completion, its nature did not admit of it. It was sworn, that the architect approved of the different charges which made up the 29*l.* 10*s.* 6*d.*, on proof of the days' work employed on the different descriptions of work, and that he had actually marked them off on the account as approved by him, but that he afterwards insisted on deducting 10*l.* 0*s.* 1*d.*, giving as his reason, that a hot-air furnace had been put up in the Custom House which cost less, though the plaintiff remonstrated, alleging that the two things were entirely different, depending on the building in which the furnace was to be set.

The plaintiff claimed also 16*l.* 4*s.* 9½*d.*, which the architect had disallowed, being the charge for window blinds of a new construction, which the plaintiff's foreman swore had nothing to do with the contract, nothing of the kind being contemplated in it, that is, no blinds of that or any other description; he swore that those were made upon a distinct agreement between the defendants' managing agent and the plaintiff; that the blinds were made and charged for by days' work, and that the architect in consequence had declined to take any notice of that charge.

Then the plaintiff claimed 21*l.* 18*s.* 7*d.* and 2*l.*, as charges for interior fittings up, done under the verbal direction of the defendants' managing agent, who was to occupy the building, and which the plaintiff's foreman swore was work done after the building was occupied, and quite independent of the contract. The defendants' architect swore, that the hot-air furnace had been talked of before the contract was made, but as they could not determine how it was to be constructed, it was intentionally left out of the specifications altogether, and that he allowed for it what he thought reasonable; that he made the deductions from the ornamental arms, because he thought the raised letters and foliage were fairly included in the plaintiff's offer for 60*l.*, and that he told him while the work was being done that nothing more would be allowed; that the window blinds, interior fittings up of counter, and other things, were extremely well done and of good materials, and that he therefore allowed good prices for them, but struck off what he thought excessive; that none

of the things for which the 16*l.* 4*s.* 9½*d.* and 21*l.* 18*s.* 7*d.* were charged were included in the specification, but that he considered that everything beyond the contract came under his valuation: he admitted that he thought the bank might notwithstanding the contract have employed any one else to do these distinct jobs as well as the plaintiff.

The plaintiff called an architect, who fully supported his charges.

Besides the items above mentioned, the plaintiff claimed to have some sums restored to him as having been improperly struck out after they had been allowed by the architect, on the ground that they were charges which had been included in bills delivered by others who had furnished some of the materials, but it was proved that that was a mistake, for nothing had been charged for by the plaintiff which had been paid for to others. The learned judge however considered, that the plaintiff could not in this action recover for any such items, but must sue on the contract, as they came under the specification, and whatever was included in the 2983*l.* or had been valued as extra work the plaintiff was entitled to, and must be sued for under the contract.

The defendants contended that the whole of the plaintiff's demand came equally under the contract, and was liable to the same objection. The jury allowed the plaintiff 56*l.* 13*s.* 5½*d.*, being the aggregate of the several items above referred to, and the defendants moved for a new trial on the law and evidence and for misdirection, or to reduce the verdict by deducting such items as the court might think improperly allowed.

*J. H. Hagarty*, in support of his rule, cited 12 M. & W. 428; *Moo. & Mal.* 257; 11 Jur. 49.

*Cameron*, Sol.-Gen., shewed cause. He cited no authorities, but relied wholly upon the evidence.

The argument is fully given in the judgment of the court.

ROBINSON, C. J.—It appeared to me at the trial, that charges for such work as the ornamental arms and the furnace, not being included or intended to be included within the specifications and so not entering into the computation of the 2983*l.*, could not be properly looked upon as an increased charge for any work done under the contract, and that the restricting clause did not extend to such work; I thought there might be doubt as to the window blinds and the interior fittings spoken of, but as it was sworn and not contradicted, that they were not in any manner embraced within the specification or intended to be so, although the counter in the banking room was said to be marked on one of the plans. I could not on any principle that appeared satisfactory distinguish those items from the others. I remarked on each separately to the jury, and told them, that although I had doubt as to the effect of the clauses in the contract in restraining the charges as to the extra work, yet it seemed to me, that works not contracted to be done to any extent or in any shape and not embraced within the specification, not from accidental omission, but as not being contemplated by the parties, such works as the defendants might consistently with the contract have employed any one else to do, were not so properly *alterations* or *deviations from* the work specified, as work *independent* of and beside the contract, and in that sense not properly additions to it.

It appeared to me further, that the calling for a proposal for the bank arms, and the procuring the furnace and other things to be done, not by



any written direction of the architect, was an argument to shew that the defendants did not themselves regard those jobs as coming under the clause in the agreement, but as something wholly out of the contract, for otherwise they might avail themselves of whatever was done upon that footing, and afterwards decline paying for it, because it had not been sanctioned by the written direction of the architect.

The contract on which the defendants rely in support of their objection has been carefully framed, and seems to have been copied from one in general use in England, for in a case of *King v. The Guardians of the Bromley Union*, the agreement appears to have been in the same words so far as it is given, and there are other modern cases in which the same form of contract can be traced. It may probably have come a good deal into use among builders in this province, and it is of some consequence that courts of justice should come to clear conclusions as to the construction and effect of such contracts, in order that each party may know what he may safely expect from their provisions. When this case came before me at *Nisi Prius*, it was the first time I had been called upon to consider the effect of precisely such an agreement, and I gave it what appeared to me to be the reasonable and obvious construction. The counsel for the defendants contended very earnestly against the view which I took of the agreement, and as it was evident to me that they were sincerely convinced that my construction of the instrument, or rather my application of it, was incorrect, I could not feel by any means confident that I was right in my opinion, for of course the conclusion which experienced counsel have come to after careful consideration at their leisure is more likely to be correct, than the view which a judge takes of the point at the instant, without means of examination and without time for considering consequences. Since the trial I have turned the matter again and again in my mind, and I still believe, without at present adverting to all the items of charge in question, some of which it is possible may be thought to stand on grounds distinct from the others, that the opinion which I formed at *Nisi Prius* happened to be correct, indeed I must say that I should have no doubt of it, if one of my brothers, who heard the argument, and who is at least as likely as myself to take the right view, had not made up his mind to a different conclusion.

If the defendants' counsel are in error in the view which they have taken of the contract, I think the error arises from their attaching an improper idea to the words "extra work."

We must consider the object of such agreements as this, and what it is that induces parties to enter into them. When one man engages another to build a house for him for a certain sum of money, unless he is careful to bind the builder down by stipulations he runs these risks: 1st, that when his house is done he may have claims made upon him for various matters which were indispensable to the completion of his house upon the plan proposed, but which he happened not to notice were omitted in the specifications, and then he is told, that because all these things (some of them perhaps trifling but amounting together to a large sum,) were not in the specifications, they are therefore not included in the price and must be paid for in addition. 2ndly, he runs the further risk, that while his building is in progress he will be tempted to direct or to sanction various alterations in the details, without reflecting that by

doing so he is departing from the specifications, and as a consequence setting the builder loose from the contract, so that he can no longer hold him to the price agreed upon, but has thus given him occasion to say, that the contract has ceased to be the guide as to price, and that he has therefore a claim to be paid whatever he can prove his labour to be worth. The laying a floor in a different manner, changing the disposition of the rooms, making a few windows or doors more or less, may subject him to this inconvenience. 3rdly, it is another evil to be guarded against, that if he adheres to the specifications so far as they go, he will without altering anything in the plan be either tempted to add some extra ornament, or the builder will take the liberty of doing various things in what he may call an improved manner, either on the pretence of giving greater strength or of making the work look better, and then as there will be charges for things directed to be done or permitted to be done, and as the specifications will have been departed from, in the more expensive way of doing the work mentioned in them, there will often be charges so far beyond anything that he thought could be occasioned by these improvements, that he finds he has no alternative but to embark in an uncertain and expensive litigation, or to submit to what he may consider very unreasonable.

If I were to say, that to neglect to guard against these sources of difficulty often subjects a party to extra charges to one third or more of the intended cost of the building, I believe I should be admitted by many who have had experience in these matters not to be stating an imaginary evil.

The contract between these parties does guard against them very clearly and distinctly; it provides against the first, (that is imperfect specification,) by expressly binding the builder to build a house for a certain sum, adding to the specifications and plans, "including whatever "may be necessarily implied though not particularly mentioned;" and further by stating, "*that if any of the works intended to be contracted for or matters relative thereto* are not fully detailed or explained in the "specifications, the builder shall apply to the defendants' architect for "such explanations as shall be necessary, and perform *his orders in that respect as part of the contract.*"

It provides against the second, (that is, the effect of alterations *in the work contracted for* in releasing the builder from his contract,) by declaring, "that any alterations in any part of the said works, by addition, "omission or otherwise, shall not in any manner make void or impeach "the contract, but the value of such addition, omission or alteration "(that is, in regard to the said works, not any new or independent work,) "shall be estimated by the defendants' architect and paid for accordingly."

It provides against the third, (that is, the effect of extra work not interfering with the specifications, further than by a more expensive way of doing the work, by additional ornaments, more expensive materials or otherwise,) by declaring in the contract and in a note to the specifications, "that *no extra work shall* be allowed for in any case unless with "the written direction of the architect, and in all cases of dispute, as to "quantity, price, &c., his decision shall be final."

A just and natural application of these provisions, it seems to me, must sufficiently protect both these parties, but they may be so applied

(though contrary both to their letter and spirit) as might be most unjust to one party.

To take the first item, the ornamental stone entablature with the bank arms: if anything of that kind had been contemplated by the contract and had formed part of the work specified, (which it is admitted was not the case,) but to be done after a plainer manner, and if after the house was done the contractor had made additional charges for raised letters when the contract specified sunken letters, or for adding foliage not provided for, but which the builder had added as an improvement, then the defendants might have said with reason, This is a charge for extra work on something contracted for and specified or necessarily to be intended by the specifications, and before you made the alteration in the work or addition to the work, you should have gone to the architect and obtained his written sanction and afterwards procured him to value it.

But the defendants maintain, that the entablature comes equally under that condition though it formed no part of the work contracted for, or intended to be contracted for, but was a separate job which the plaintiff was asked to tender for while the house was in progress; they say it is *extra work*, and therefore is all within the direction of the architect. In one sense to be sure it was *extra work*, that is, it was beside the contract and had nothing to do with it, but when it is shewn to have nothing to do with the work mentioned in the contract or specifications, then in my opinion we can no longer treat it as extra work done under the contract.

There is no point now better settled, after some fluctuating decisions upon it, than that whenever it appears on a trial that certain work has been done under a written contract, the court will require the contract to be produced, although the plaintiff may contend, that he is suing for extra work not included in it, for as a learned judge said rather quaintly in one of these cases, how can we tell certainly what is *extra* the contract till we see what is *extra*. There is a case which came before Lord Tenterden, of Reid et al. v. Battle, Nev. & Man. 413, where this point was presented, and which singularly enough was an action for an ornamental entablature, to be placed in front of some houses which were being built for the defendant. The plaintiffs sued for work and labour and materials, as is done here; it appeared in evidence, that the inside work of the houses had been done by the plaintiffs under a written contract, but that while it was going on a witness heard a new order given for the entablature. Lord Tenterden considered, that under such circumstances it was clearly not imperative on the plaintiffs to produce the written contract, and the reporter in comparing this with other cases notices the distinction. "Here," he says, "there was express evidence, that the work in question was under a new order perfectly distinct from that contained in the written agreement under which the rest was executed; even the existence of this agreement was therefore quite immaterial to the case."

Mr. Starkie, in his Treatise on Evidence, 3, 1296, (note R,) after referring to Vincent v. Cole, Moo. & Mal. 257, where it had been held necessary to produce the agreement, says, "it is otherwise where an oral order is given for *other* work during the continuance of the first employment," and he refers to the case which I have cited. In Robson



v. Godfrey and another, 1 Stark. C., there had been a written contract, but the work sued for had not been done according to it; the defendant was for holding the party to his written contract, which entitled him to make his payments by instalments, and he contended, that the plaintiff could only sue on his special contract; but Gibbs, C. J., said, "this additional work has been done under a subsequent order; there was nothing in the original agreement to govern the new work according to the stipulations, on the contrary the parties proceed upon the ground, that the terms of the agreement were not applicable to the new work, and therefore the time of payment cannot be applicable."

I consider, that in this case the plaintiff was not bound to have made this ornamental entablature, nor to have found materials for it; and that the defendants were at liberty on the other hand to have put that distinct job into the hands of any other workman, it being not extra work done in the course of anything which the plaintiff had bound himself to do, and so being a matter wholly apart from the agreement; if not, then the plaintiff might as well have been required to surmount the entablature with a marble statue, and provide materials and a sculptor, and be bound to accept whatever the defendants' architect might choose to say it was worth.

Then as to the furnace for hot-air, it was proved that the contract and specifications, not accidentally but designedly, omitted to provide for anything of the kind, and were framed for a house to be warmed in the common way. The defendants' agent had at one time intended otherwise, but changed his mind and intentionally left it out; yet afterwards he determined when the building was up that he would have it, and after the plaintiff had by his verbal direction gone to the patentee of a particular invention and employed him to put a furnace in the house, finding him with labourers and materials, the defendants claim a right, though they did not call for this to be done as extra work by any requisition in writing of the architect, (considering perhaps, and I think rightly, that this was not a case for it,) to refuse to pay anything more for the furnace than their architect might choose to allow, whatever sum the plaintiff may have had to pay the patentee or the labourers. I wonder that this should be thought reasonable, and yet I have no doubt the defendants desire only what appears to them reasonable. If the specification had embraced a hot-air furnace of a certain kind, and after the work was done the plaintiff had made an additional charge because he had carried the pipes into a greater number of rooms, or had consulted ornament or security by any deviation from the plan, made of his own accord or without a written order, then as in the case of the entablature, if the specification had required one of some kind, the defendants might have said, You are claiming for an alteration of the work contracted to be done, and we will not pay for any *such extra work* otherwise than according to the agreement.

It appears to me that both of these jobs, done as they were upon distinct orders and not connected with anything in the specification or intended to be included in it, no more came under the agreement, than if the defendants had, while the work was in progress, determined to have the house lighted with gas or supplied by water pipes, and had employed the plaintiff, as they might have done any one else, to do it.

Suppose the defendants had resolved to have their principal room adorned by a painted ceiling with classical figures, surely it could not be said that that was done under this contract, and yet it could not be more out of this contract than other matters which it was sworn by the defendants' own witnesses were not in any manner embraced or intended to be embraced in the contract. In regard to the shutters and inside fitting-up of the banking room, I had more doubt on the trial, but I do not see still on what clear ground they can be placed on a different footing from the two items I have mentioned. It was proved by the defendants' own architect, that it was work which any one else might have been employed to do, but that could not be said with respect to anything specified in the contract or plan, or fairly to be implied as embraced in it. It is not a matter of course, that shutters of that kind should be put to houses, and especially to large substantial houses of the character of public buildings. The greater number by far are, I believe, without them. They may be put up at any time or not at all as parties may choose; they are not necessary to the building, which as a house is complete without them; therefore as nothing was said of such shutters in the specification, or of shutters of any kind for the purpose which these were to answer, and as there is no ground for holding, that they were to be implied though not mentioned; they seem to rest on the same footing as any other separate job (irrespective of the contract) which the plaintiff was by a subsequent order desired to make; and so as to the interior fittings or finishing of any room, not provided for or considered to be required by the contract.

If they were works of that kind, how can we on any principle distinguish them from any other work which when done would be part of the house, but which was certainly not contracted for, or intended to be by the agreement. One kind of fitting-up might be vastly more expensive than another, and when the contract confessedly did not embrace, and was not intended to embrace any internal fitting-up whatever; I am of opinion, that the work so done cannot be treated as done under the contract at all: otherwise, if a builder were to engage to build a small and plain cottage for 100*l.*, under such a contract as was entered into in this case, then if everything that could be put upon or to the house inside or outside, upon distinct orders afterwards given, must be looked upon as extra work, because nothing about it was found in the contract; then the builder might find himself involved in a contract of 1000*l.*, whether he had ability to perform it or not, and must be at the mercy of a third party's valuation in respect to matters never in any degree contemplated by him. Some stress was laid on the fact, of the plaintiff having charged some of this work in the same account in which he had charged his extra work coming clearly under the contract; but that has not much weight, I think, because the workman would naturally do so, making his claim for what he felt himself entitled to, expecting to get it without reduction by the architect, meaning not to be difficult as to any objections that could be shewn to be reasonable, but resolved to insist upon a fair compensation as a matter of right, if there should be an inclination to refuse it to him.

On the other hand, the fact, that the defendants did not call for any of these jobs to be done through their architect by a written requisition,

as would have been proper if they considered that they were to be done under the contract, is a strong proof that the defendants did not look upon them in that light; and in this respect the case of *Burn v. Miller*, 4 Taunt. 745, seems to me to bear upon the present case. There the plaintiff, as tenant of an inn under the defendant, was to build a tap-room within two months, *according to a plan to be agreed upon between the parties*, and the defendant was to take it at the end of the year at a valuation. No specified plan was ever drawn out or agreed on, and the building was not done till after the two months; but the defendant had entered into possession and enjoyed it. Macdonald, Chief Baron, ruled, "that as no plan of the room had ever been drawn out, it was for the jury to consider whether the building had not been carried on nevertheless with the defendant's approbation;" and he considered, that the limitation of two months was inserted with reference to the plan intended to be provided; "*and as no plan was provided, he thought the condition as to the two months was not to attach.*" The jury gave a verdict for the plaintiff, which the court refused to set aside.

So in the case before us, if the defendants considered that they were calling for extra work which the plaintiff was bound to perform under his agreement, they ought to have required it to be done in writing as the agreement provided in regard to extra work, and then they could have insisted, that the plaintiff should abide by the architect's valuation as the contract provides in respect to such work; not having done so, it seems to me, that the latter stipulation does not attach. I have looked at several late cases on building agreements in England, reported in the *Jurist* for 1838, pages 787 and 1031, and in the *Law Journal*, N. S., for 1844, Exch. 91, and at a case of *King v. Guardians of Bromley Union*, 11 *Jurist*, 49, but I see nothing in them at variance with what I have imperfectly laid down. The last case might appear to be so, if we omitted to notice, that there the plaintiff was trying to recover for work contrary to the award of the architect, about which there could not be the remotest doubt, that it was extra work done under the terms of the contract, because it was additional excavation which the builder had found to be necessary in order to get a sufficient foundation for his work. It was the same as if the builder in this case had been insisting on an additional price because the thickness of the walls, as mentioned in the specification, was insufficient, and he had therefore added to them. I take *Morgan v. Birnie*, 3 Mon. & Sc. 76, to have been certainly a case of the same kind, that is, of work done in addition to the specification, but in addition to something contemplated as part of the work though to be done in a different manner; anything of that kind would be extra work done in executing what the builder had contracted to do.

Some of these items clearly, and I think all of them, although they were for work done in and about the house which the plaintiff had agreed to build, were not extra work done under the contract, but distinct work done without reference to it, upon separate orders independent of the contract, and treated by the defendants themselves, and as I think properly, at the time as being independent of it.

On these grounds I think the verdict should stand.

MACAULAY, J.—The objection made to the plaintiff's recovery is not that the instructions for the additional work in question were not received



from the defendants' architect in writing, but that the same is subject to his valuation, and payable according to the terms of the contract. The plaintiff in effect contends, that as he did not receive instructions for such additions from the architect *in writing*, they do not come within the terms of the contract, and that being done under the verbal directions of the architect, with the sanction of the defendants' managing officer resident in Toronto, the defendants have thereby waived the benefit of the protecting clause as respects the determination of the value of the work.

I am not able to take such a view of the case; it appears to me that the work was additional; *extras*, in such agreement, including alterations and additions, and the contract distinctly provides for such contingencies. It is an agreement with a corporation executed by them under their seal, and so far from there appearing any implied authority to the architect, or the officer in charge of the defendants' affairs here, to bind them by verbal orders, the very contrary is not merely implied but expressed, and it behoved the plaintiff not to go beyond or out of the contract without written authority for so doing.

The clause on this head is inserted for the protection of the defendants, and I do not think, that an implied promise to pay on request whatever the work may be worth, arises by reason of the defendants having accepted the benefit of such additional work, however it might be regarded as an implied waiver of written instructions.

The want of written orders is not made a ground of objection, but the defendants contend, and I think rightly and fairly, that the work, like all the other extras and additions, is subject to the valuation of the architect under whose directions and superintendence the whole was done; this is not a newly devised form of contract; it is evidently founded on precedents in England.

The case of *Morgan v. Birnie*, 9 Bing. 672, and 3 Moo. & Scott, 76, seems to be precisely similar. There the objection was, that though (as here) the architect had checked off the items of the plaintiff's claim as approved, he had not certified his approbation of the work according to the agreement, and the plaintiff was nonsuited. And the cases in the *Jurist* for 1838, pages 787 and 1031, and the more recent one of *Kirk v. The Guardians of Bromley Union*, *Jurist* of 1847, page 49, where the contractors resorted to equity for redress under contracts of this kind, shew that a remedy at law was not supposed to exist.—See also *Paine v. The Guardians of the Poor Strand Union*, 10 *Jurist*, 308.

If the work is within the scope of the contract at all, I think the plaintiff is bound by the architect's valuation, and I cannot see why it is not; it is not separate from the house. The stone ornament and the shutters and the hot-air flues and chamber, &c., form part of the building, and the counters, &c., constitute fixtures. Perhaps the plaintiff might have objected to do such work as not incumbent on him under his contract, but having done it under the directions of the architect, and included it in his account against the defendants with the other work, I do not think he can contend, that it is not additional or extra work within the meaning of the contract; and the defendants being willing to pay, and indeed having paid into court the amount of the architect's valuation, I do not think the plaintiff entitled to anything more. The previous

estimate, with a view to the stone ornament and hot-air work not being originally contemplated, does not in my estimation materially affect the question.

I look upon the whole as *additions* within the meaning of the contract. Had the defendants, instead of the hot-air works, required additional chimnies, flues, stove-holes, or the like, there could be no question, and had the fittings for a hot-air furnace been included in the original specifications and contract, it would not have been remarkable.

Such work was not embraced in the original agreement, but I look upon it as liable to be engrafted thereon under the head of additions, and as now forming part of the building. I think it was at the time regarded by the plaintiff as additional work within the agreement, and that however he might have declined performing such additions subject to the architect's valuation, still having made them without objection, I consider him bound to abide thereby; otherwise I do not see how the defendants could, by any terms they could use, guard themselves against after charges of this kind, for the agreement says, that all instructions for any additional work shall be received from the architect in charge *only in writing*; and that no extra work will be allowed *in any case*, unless with the written directions of the architect; and in all cases of dispute, as to quantity, price, &c., his decision to be final, and no payment to be made, unless on the architect's certificate on the value of the work executed. And when the work shall be completely finished, and all additions adjusted, and the ultimate balance settled and certified by the architect, &c., the defendants shall pay, &c. I do not think the words, "in any part of the said work," limit additions to the extent contended for. The word *additions* must be read as "to" not "in" any part of the said works; in other words, as authorising additions to any part of the said works, and certainly the additions in question were made to the said works—they were not made elsewhere, or apart from or independent of the main work, namely, the bank edifice.

*Additions* to the drawings and specifications *in any part of the said works*, or *additions* to any part of the said works, seem to me of like import and effect; and I humbly consider the window shutters, the front ornament, the hot-air works and the counter, &c., as all constituting additions to the works mentioned in the original specifications and agreement, and within the true intent and meaning thereof. I see no room for any question, unless it be in relation to the hot-air, but perceive no good reason why that part should not be so regarded as well as the rest. It was subordinate to and in promotion of the main object of the contract, which was to erect a suitable building for banking purposes; and surely an improved system of heating it, could not, in a country like this, where it forms so great an object, be reasonably looked upon as something so entirely beyond or out of the contract, as not to admit of its being termed an addition thereto; and at all events the agreement expressly states, that no extra work will be allowed for in any case, unless with the written directions of the architect, and then to be paid for upon his valuation and certificate.

JONES, J.—To compel the plaintiff to do any work regarded by the defendants as extra work in the completion of his contract, it was incumbent upon the architect, according to the tenor of the contract, to require the performance of the work in writing. That was not done in respect

to the work for which the plaintiff obtained a verdict; and with regard to the coat-of-arms put upon the top of the building, it appears from the testimony, that the plaintiff was called upon by the defendants or their agent to make an estimate and tender for the doing it; that he did so, and that his tender was accepted. There was no valuation in such case required, nor was the work considered by either party as within the contract, because if it had been, no price need have been agreed upon, but the value of the work would have been estimated by the architect. The amount recovered on that account appears to be some 6*l.*, beyond the price agreed upon, for work upon it proved to be extra or beyond that which was estimated by the plaintiff, and upon which the agreement to do the work was performed; and moreover, if it could be regarded as extra work, and the plaintiff entitled to recover it under the contract upon the valuation of the architect, there was proof here, that the architect had admitted the valuation as charged.

The other items, for which the verdict was given, appear to me to be such work as the defendants had a right according to the contract to call upon the plaintiff to perform, if required, as directed by the terms of the agreement; but not being so required, they cannot be regarded as coming under the contract, and subject to the valuation of the architect. If therefore the work had been required to be done in the manner pointed out by the contract, and had been so done, I should consider it as extra work, and that the defendants were only bound to pay for it according to the valuation of the architect; but inasmuch as it was not contained in the specification annexed to the contract, nor required to be done in writing as extra work according to the terms of the contract, but upon an understanding of the parties, as appears from the evidence, that it was not within the terms of the contract, and particularly with regard to the coat-of-arms, that it was done upon a distinct tender and acceptance, if the plaintiff could not recover in this action, he would have no remedy for the amount sued for, nor for several hundred pounds which the defendants voluntarily paid as extra work, because the extra work done was not required by the architect in writing according to the contract.

*Per Cur.*—Judgment for plaintiff on the demurrer.

MACAULAY, J., *dissentiente*.

---

#### MCINTYRE V. THE CITY OF KINGSTON.

The averment of some other consideration or inducement for the making of a lease, than the annual rents mentioned in the lease, is not necessarily a contradiction of the lease, and therefore bad.

A plea, averring some other consideration, must shew *that* consideration past and executed *before the giving of the lease*.

After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction cannot be pleaded in bar of an action on the lease.

The plaintiff in this case sued the corporation of the City of Kingston on a bond, of which the defendants cravedoyer, and set out the condition, which was to abide an award, and they pleaded, setting forth an award made, that they should pay to the plaintiff 125*l.*, together with legal costs of suit, arbitration or umpirage, to be paid on or before the 1st of November, 1844. Then they pleaded, that after the award made, and



before the action was brought, viz., 22nd January, 1846, the defendants, by an indenture of lease, *in consideration* of the rents and covenants therein reserved, &c., did, at the request of the plaintiff, demise to him certain premises to hold for ten years from the first of May, 1845, yielding and paying therefor every year 2*l.* 10*s.* in manner therein specified; that the plaintiff entered under the said demise; and the defendants then aver, "that they then demised the said premises, and "delivered the said indenture to the plaintiff, and that the plaintiff then "accepted and received the said demise and indenture from the said "commonalty of Kingston, &c., in full satisfaction and discharge of the "said *award*, and of all monies then or thereafter to become payable to "the plaintiff by virtue thereof, and all action, cause or causes of action, "arising or to arise or accrue from the said writing obligatory mentioned "in the said declaration."

The plaintiff craved oyer of the lease, and set out and demurred.

He relied chiefly on this as a ground of demurrer, that the defendant's plea was inconsistent with the lease produced, for that the latter purported, on the face of it, to be made solely in consideration of the rents and covenants therein contained, and made no mention of the award; whereas the plea stated the demise to have been made in satisfaction and discharge of the award.

Another objection was taken, that the demise was not alleged to have been in satisfaction of the costs of suit, which the award directed to be paid; but there was nothing in that, for the plea stated the discharge and satisfaction in such a manner, that if it was sufficient to discharge any extent, it was sufficient to discharge all that could be claimed under the award.

*McKenzie*, for the demurrer, cited 1 Saund. 316.

*Burrowes*, contra, cited 3 T. R. 374.

The argument on the demurrer fully appears in the judgment of the court.

ROBINSON, C. J., delivered the judgment of the court.

It was insisted on the argument, that as the lease appears on the face of it to be made in consideration of certain annual rents, it is conclusively to be assumed, that the lessors could have had no other inducements for making it than those rents, and that to aver any other consideration or inducement is to contradict the deed; but that I take to be clearly otherwise. In all cases of fines on renewal, the tenant consents to pay a consideration for a demise, which when made is to be on condition of paying certain rents. For all we know, the premises which the defendants let to the plaintiff for 2*l.* 10*s.* yearly rent, may have been worth much more, and may have been formerly leased to the plaintiff or others for a larger rent, and they may have been let to this plaintiff at a small rent expressly as a compensation for his claim on the corporation.

There is in reality nothing absurd or repugnant in such an understanding and agreement; and in my opinion, to aver it is not to set up anything inconsistent with the deed; for all that the deed imports is, that the premises are to be held at the rents mentioned; but the lessee may well have agreed to give a certain sum in order to obtain a lease on those terms. The principle of the cases, *Rex v. Inhabitants of*

Scammonden, 3 T. R. 474, Rex v. Inhabitants of Laindon, 8 T. R. 474, and Roe dem. Wilkinson v. Tranmarr et al., Willes, 685, applies to the point; and they are supported by certain decisions, as in 1 Coke, 176, and Villers v. Beaumont therein cited. There would have been no difficulty in stating the transaction in such a manner as would well have stood with the deed; though the best way of guarding against all objections would have been to set forth the transaction according to the fact in the lease, which would have freed the case from an objection which I shall presently notice.

As the matter is stated in the plea, I apprehend there are objections which cannot be got over, and it is to be regretted, because such objections tend to embarrass and defeat the claims of justice.

The plea does not clearly state, that the plaintiff had agreed before he got the lease, that he would take a lease upon such terms in satisfaction of the 125*l.* awarded, and does not therefore exclude the inference, that this plea may be an attempt to set up a parol agreement to discharge in consideration of *having got* the lease on those terms, which would be clearly *nudum pactum* and bad, because if the defendant had actually got the lease at a certain rent before making such agreement, that could form no consideration for a promise to be afterwards built upon it. It would resemble the case of Kaye and Dutton and others of that class, where a promise had been endeavoured to be supported on a past consideration, from which no promise could be implied in law, and where there was no debt due which would form a continuing consideration.

It is true, that the defendants say in their plea, after stating the demise, that the plaintiff *then* received the demise in satisfaction, but I do not consider that to be sufficiently explicit to shew, that the claim under the award formed part of the consideration of demising. It is consistent with the plea, that the demise may have been made and executed without any consideration of that claim; and that at the instant of receiving it the plaintiff may have said, because the defendants had thus given it to him he would discharge them from the 125*l.*, which would have been gratuitous, and not a binding undertaking.

But the clearest ground of objection to the plea is, that it relies upon something collateral done after the bond was forfeited, as being given and accepted in discharge and satisfaction, not merely of the condition and damages for its breach, but "of all actions and causes of action upon the said writing obligatory."

Though I confess I find it difficult to understand and reconcile the cases on this point of accord with satisfaction, being or not being a good bar to an action on a bond with condition to do some collateral thing, as for instance Peyton's case, 9 Co. 79, with Dyer 1, Noys v. Hopgood, Cro. Jac. 649, and Alden v. Blague, Cro. Jac. 99: yet I take it to be law, that after breach of the condition of a bond, the acceptance of some collateral thing in satisfaction cannot be pleaded in bar of an action on the bond.—Lemesurier v. Smith, U. C. Reports; 3 Bing. N. C. 454; Yelverton, 192.

It seems an unnecessary impediment thrown in the way of obtaining the ends of justice, but we cannot alter the law; and where the facts have not been really such as to make satisfaction given and received available in law as a defence, by reason of the technical rule I have refer-

red to, the courts have pointed to a remedy, as in *Mease v. Mease*, 1 Cowper, 47, by the equitable interposition of the court, or the parties may seek relief in equity.—Com. Dig. Chancery. 4 D. 1, 20.

*Per Cur.*—Judgment for the defendant on demurrer, with leave to amend.

---

LIDDELL V. MONRO.

The covenant in a deed upon which a party sues must be express and distinct, and not gathered as arising consequentially or morally, by reason of something else that is contained in the deed.

The plaintiff sued for an alleged breach of covenant of the defendant, and he stated what the covenants were which were entered into between them. That it was agreed that defendant should sell, and he thereby did sell to the plaintiff absolutely all his, defendant's, interest in the goods, chattels, stock in trade, debts and accounts of the business, trade and concern at the south-east corner of the market buildings, then carried on by the plaintiff: and that all debts, *dues*, *monies* and *accounts due* to the said concern should be collected by plaintiff for his own use, and that full power and authority was thereby granted by defendant to plaintiff for that purpose; that no debt or liability of defendant should in any way affect the plaintiff or the said concern or business—for the due fulfilment of which agreement the plaintiff and defendant bound themselves each to the other, under their hands and seals.

The plaintiff assigned as a breach of this covenant, that while an action was pending in his favour against one McManus, for a debt of 59*l.* due to the concern, the defendant wrote a letter to Messrs. Blake & Morrison, the attornies of McManus, stating that he thought McManus had just grounds of complaint, at being put to the expense of defending himself against any suit brought by plaintiff for goods delivered out of the store during the time he, Liddell, had a share for conducting the business; that he (defendant) was quite sure McManus had an account for pork barrels and other work; and that he had always been under the impression, that McManus's account would quite balance the store account, and that in that opinion he thought he was not much mistaken, &c., which letter was produced by Blake & Morrison on the trial of the cause, and read to the court and jury, by reason whereof a verdict, which still remained in full force, was rendered for McManus. And the plaintiff averred, that no sum of money was due by the plaintiff or by defendant or by them jointly or by the concern to McManus, but that McManus was indebted in the said sum to him, the plaintiff and the defendant together; and that he, the plaintiff, ought to have recovered a verdict against the said John McManus; and that by reason of the writing of said letter to Messrs. Blake & Morrison, the attornies of the said McManus, he, the plaintiff, lost the amount due by McManus, and was obliged to pay a large sum of money for McManus's costs and his own costs, and so the plaintiff alleged the defendant hath not kept his covenant, but hath broken the same, &c.

The defendant's last plea to this declaration was demurred to, and on the argument was admitted to be bad; but certain objections were



notified and taken to the declaration on general demurrer, viz., that the declaration disclosed no breach of any covenant therein set forth; that no agreement or covenant was shewn on the part of defendant, not to make any statement respecting any claim of the said concern, or any alleged debt thereto, or against intermeddling in such alleged claims, with a view towards settling or arranging the same or otherwise, nor did the declaration shew how the letter set forth could have affected the said verdict, or what was the issue to be tried in the said suit against McManus, nor how any statement in the letter should have caused such a result, nor why, if any of the statements in the letter were untrue, not being positive, they could not have been satisfactorily explained to the jury by the plaintiff; and that it did not appear by the declaration why the defendant was made a plaintiff with the plaintiff in this suit in the said action, or what interest the now defendant had in the subject matter thereof.

*J. H. Hagarty*, in support of the exceptions taken to the declaration, cited 11 M. & W. 187; 5 Ad. & Ell. N. S. 671.

*H. Eccles*, contra, contended, that all Monro's interest passed to the plaintiff, and that any interference with the plaintiff in collecting the debts, was in effect a breach of the covenant.

ROBINSON, C. J.—I am of opinion that this action of covenant cannot be supported on the special agreement stated, for there is no such stipulation as that which the defendant is charged with having broken. The case cited of *Aspden & Austin*, 5 Ad. & Ell. N. S. 671, and also the case of *Dunn v. Layles*, which immediately follows it, affirms the principle that a covenant must be express and distinct, not gathered as arising consequentially and as it were morally by reason of something else that is contained in the deed. I do not think that by any allowable construction the writing the letter set out in this declaration can be made out to be a breach of anything which the defendant engaged to do or not to do. In fact, there is but one thing stipulated for, and that is, that no debt of the defendant's shall be suffered to affect the plaintiff or the concern or business—that is, no debt due by the defendant individually and alone. It is not charged that any such debt has affected the plaintiff. The other things in the agreement, namely, that the plaintiff should collect the debts for his own use and should have authority to do so, are mere arrangements assented to by the defendant, but involving no covenant by him. If the defendant has wrongfully done anything contrary to the spirit of these arrangements, by which the plaintiff can be shewn to have sustained any injury, that might perhaps afford ground for an action of another kind; but before we can sustain this action of covenant, we must see that there is a covenant which has been broken.

The declaration seems to be in other respects insufficient, but it is not necessary to look farther, if no such action lies upon the covenant as that which has been brought. I think it is clear that none does, and that there must be judgment for the defendant on the demurrer.

MACAULAY, J.—Deeds should be stated in the pleadings according to their legal effect, or if it is desired that the court should construe them, they should be set out *in hæc verba*, or at least so much as is meant to be relied on.—*Moore v. The Earl of Plymouth*, 3 B. & A. 69;

Attwood v. Taylor et al., 1 M. & G. 279, 280, note (b.); Stephens' Pleading, 428.

Now here the agreement is under seal, and though profert is made thereof, in the declaration, oyer was not prayed, nor was it set out or enrolled, and the declaration must be understood therefore as merely stating its legal effect and not its literal contents; but in setting forth its legal effect, no covenant is stated, a breach whereof would be committed by the facts alleged by way of breach.

The court is left to infer a covenant, and having determined its legal import and effect, then to decide whether the breach assigned shews such covenant to have been broken. The uncertainty on this head appears to me to be a sufficient ground of demurrer.

The plaintiff should state the covenant, for a breach of which he complains. The declaration seems also open to other objections of uncertainty and insufficiency noted in the demurrer book.

MCLEAN, J.—The letter of the defendant, of which the plaintiff complains as a breach of covenant, can only be a breach of that covenant which relates to the collection by the plaintiff of *all debts, dues, monies and accounts due* to the concern for his own use, and the power and authority granted by defendant to the plaintiff for that purpose. Now that covenant is not, that the defendant shall not express any opinion as to any account or sum claimed to be due to the concern, and the defendant is not bound to remain quiet, and to allow accounts to be collected in his name which he may be aware are not due.

If he had given a release to McManus, which he might have done, being a plaintiff in the suit against him, he would be liable on this covenant if the plaintiff could establish the fact, that a debt which he was entitled to receive was actually due. But the writing of the letter in question did not preclude the necessity of proof on the part of McManus as to his account against the concern, and the statement of defendant that McManus had an account, and his impression of its amount is not such as necessarily to entitle McManus to a verdict.

If the plaintiff had clearly proved an account due by McManus, that proof must have been met on the part of the defence, and then the opinions expressed in the letter would have been found correct or otherwise according to the evidence.

It may in fact have been the case, that the plaintiff failed to prove his account against McManus at the time, and that he now wishes to ascribe his failure to the letter of the defendant. If that letter could be regarded as a breach of the covenant, the question upon the trial of this suit must be, whether it *caused* the verdict for McManus; and how would it be possible to ascertain that it was the sole cause of such a result?

It appears to me, that as no covenant is set out prohibiting the interference of the defendant in any suit brought in his name, and as the interference in this case was by letter, not in any way conclusive in its character, or necessarily involving or causing a loss of the suit against McManus, it cannot be regarded as a breach of any covenant set forth, and therefore that plaintiff does not shew in his declaration a sufficient cause of action against the defendant.

JONES, J., concurred.

*Per Cur.*—Judgment for defendant on demurrer.

## FERRIE ET AL. V. LOCKHART.

It is not necessary under the 4th, 5th and 24th clauses of 8 Vic., ch. 48, that the judge's order under the *Insolvent Law* should be confirmed by the Court of Review, before it can operate as a discharge of the bankrupt from actions. The final order must comprise an order as well for the distribution of the effects of the bankrupt, as for protecting his person and goods from process. Where exceptions to pleadings are not noticed in the demurrer books delivered, nor any notice of them given into the court before the argument, they cannot be urged.

## Debt on judgment.

Second plea, that after the accruing of the cause of action in the declaration mentioned, and before the commencement of this suit, to wit, on the 17th day of October, A. D. 1846; the defendant being a trader within the meaning of the statute passed in the 7th year of her majesty's reign, entitled, &c.; and having failed before the passing of the said statute, and having resided twelve calendar months in Niagara, in the district of Niagara, under and by virtue of and according to the directions and provisions of a certain statute, made and passed in the 8th year of our lady the now Queen, intituled, "An act for the relief of insolvent debtors in Upper Canada, and for other purposes therein mentioned," duly presented his petition for protection from process, to Edward C. Campbell, Esq., then and still being judge in bankruptcy in the said district of Niagara, in which district the said defendant had resided twelve calendar months previously; which said petition was afterwards, to wit, on the 20th October, A. D. 1846, filed of record in the Insolvent Court of the said district; and the said defendant further says, that such proceedings were had in the said Insolvent Court of the district of Niagara, upon the said petition of the defendant, that afterwards and before the commencement of this suit, to wit, on the 23rd day of Jan., A. D. 1847, a final order was made by E. C. Campbell, Esq., the judge of the said Insolvent Court, for the district of Niagara, duly authorised in that behalf, for the protection of the person of the defendant from all process; whereby and by virtue of which said order the defendant was discharged of and from the said cause of action in the declaration mentioned. And the defendant further saith, that the said order and discharge still remain in force, and this the defendant is ready to verify.

Demurrer, that it was not alleged that the final order therein mentioned was confirmed by the Court of Review.

*Cameron, Sol. Gen.*, for the demurrer, referred to the 5th, 24th, 59th and 61st clauses of the 8th Vic., ch. 48; and to sec. 59 of the 7th Vic., ch. 10; also to 2 D. & Lown. 529, 646.

*Eccles*, contra, contended, that the 24th clause required no more than the plea stated.

ROBINSON, C. J.—I think the causes of demurrer assigned can only be taken to except to the pleas setting up the defendant's discharge under the Insolvent Debtor's Act, on the single ground that the judge's final order is not shewn to have been confirmed by the Court of Review.

It is true, the plaintiff says in general terms, that "*the final order as pleaded is not a sufficient discharge*," but saying this after he had pointed out an exception to it, which if good must be fatal, and pointing



out no other, must be considered by us as referring only to the objection thus specified—so far I mean as concerns any special cause of demurrer.

The plaintiffs have urged besides, that the final order is not well pleaded, because the pleas do not shew that it comprised an order for the distribution of the effects of the bankrupt as well as for protecting his person and goods from process. They desired also to take as another exception, that the pleas do not aver that the defendant had been a trader within the meaning of the Bankrupt Act, to the requisite amount. I do not find, on comparing the pleas with the provisions of the Bankrupt Law, that any such objection could be maintained.

The other objection would seem to be clearly tenable, the case in 2 Dowl. & Lowndes and the statute being on that point express, and there being no doubt that our statute 8 Vic. chap. 48, as well as the British statute on which that case was determined, requires that the final order, to make it a valid one, should embrace both objects. The provisions in both acts are alike. But as regards these two exceptions, they are not noted in the demurrer books delivered, nor any notice of them given in before the argument, and the plaintiffs therefore are not entitled to urge them. The question is, whether it would be proper that the court should of itself entertain and give effect to that one of them, which, if it had been properly taken must have prevailed. That must in all cases be a matter of discretion with the court. If the record disclosed a defence necessarily defective in itself, independently of the manner in which it is stated—that is, if we could see that the order of protection was really and clearly an invalid one—then I think we could hardly pass over the defect, though the plaintiff had precluded himself from taking the objection. But we are not to infer that a bad order has in fact been made, though the defendant has made a slip in not setting it out fully.

We ought not therefore, I think, to notice any but the cause specially assigned, and as to that, I am of opinion that it is not a good exception. The question depends on the joint operation of the 4th, 5th, and 24th clauses of the 8th Vic. ch. 48, and I see nothing in them that entitles us to hold that the judge's final order of protection requires to be confirmed by the Court of Review before it can operate as a discharge of the bankrupt from actions. I cannot satisfy myself, on a careful perusal of the statute, that the Court of Review has anything to do with confirming such orders. If it were intended, as it may have been, it is certainly not expressed; and there is no foundation, I think, for our holding, that because the bankrupt law requires the bankrupt's certificate of discharge to be confirmed by the Court of Review, therefore the final order made under the insolvent law must be in like manner confirmed there.

Considering the analogy between the two subjects, we might have expected that the legislature would have subjected the one to confirmation as well as the other; but they have not done so, either by any general language in the latter statute that can imply it, or by any express provision; while on the other hand they have enacted, in the 24th clause, in words most distinct and positive, that the judge's order alone should be a sufficient bar, and that when produced and his signature proved, the evidence shall be sufficient to support the plea.

If we were to hold, that it should nevertheless be no defence till the

Court of Review had confirmed it, we should be legislating. That is sometimes done to a small extent, it may be said, from necessity, to prevent injustice, and where it is plain that the legislature must have intended something which they have failed to express; but we are not sure that they did mean that what is contended to be necessary here should be so, and if they did, we have no evidence of that meaning, and cannot assume it.

The 5th clause, it is true, provides that the final order "shall operate as a discharge of all debts *as fully and completely* and to the same extent as if such trader had obtained a certificate under the 59th clause of the Bankrupt Act," and the argument is, that this reference to the certificate of discharge makes it necessary to have the same confirmation of the one as of the other, before it can have force. But the only obvious meaning of that 5th clause is, that the final order, when made as the act provides it shall be, shall have the same effect without any confirmation as the certificate has with it, for no confirmation is required, nor is any jurisdiction in the matter given to the Court of Review, and the 24th clause coming afterwards precludes any other construction, which indeed is also confirmed by the 30th clause.

MACAULAY, J.—I do not see that the defendant, seeking protection under the 8th Vic., ch. 48, requires the confirmation of the Court of Review under the 7th Vic. ch. 10, or that a final order for protection and distribution under the former requires any confirmation under the latter.

The 8th Vic., ch. 48, sec. 55, enacts, that the final order shall operate as a discharge of all debts due up to the day of filing the petition, as fully and completely and to the same extent as if the defendant had obtained a certificate under 7 Vic., ch. 10, sec. 59; now such a certificate has no force unless confirmed under section 61,—the 8th Vic., ch. 5, therefore evidently contemplates a certificate confirmed, and declares a first order (without more) equivalent thereto; no appeal is given to the Court of Review.

As to the *amount* being sufficiently stated to shew the defendant within the 8th Vic., ch. 48, I see no force in the objection. The defendant sought its protection as having been a trader before the passing of the act 7 Vic. ch. 10, but excluded from the operation thereof as having failed before it was passed, not as a trader owing debts under 100*l.*, and the judgment, which existed before the act passed, shews the debt in this action to have far exceeded that amount.

As to the omission in the plea, to describe the final order as made for distribution as well as for protection, it is not noted or made a ground of demurrer, but if in fact the order is defective in that respect, the plaintiff may apply to withdraw the demurrer with leave to reply to the plea.—2 D. & L. 529, 646.

JONES, J., and McLEAN, J., concurred.

*Per Cur.*—Judgment for defendant on demurrer.

---

## FOOTT v. BULLOCK.

A bond given to secure a sheriff a certain fixed salary or otherwise, to be paid by his deputy, is not void.

Debt on bond—conditioned that one John Mercer should well and truly perform the duties belonging and pertaining to the office of deputy sheriff for the Western District, with assignment of breaches of duty.

Fifth plea, that before and at the time of making the said writing obligatory in the declaration mentioned, the plaintiff had held, enjoyed and exercised the place, situation and office of the sheriff of the Western District of that part of this province formerly called Upper Canada, the same then and still being an office touching and concerning the administration of justice; and the defendant says, that heretofore and before the making of the said writing obligatory, to wit, on the 1st day of January, 1843, it was unlawfully, corruptly and against the form of the statute in such case made and provided, agreed by and between the plaintiff and one John Mercer, that the plaintiff should make and appoint the said John Mercer his deputy sheriff of the said Western District, upon certain unlawful terms and agreements, to wit, that the said John Mercer should take and receive to and for his own absolute use and benefit all the profits of his said office of sheriff, and should pay to the plaintiff the sum of 100*l.* per annum, so long as he should continue his deputy, whether the said profits of the said office of sheriff should amount to 100*l.* per annum or not; and the said John Mercer should obtain and procure the defendant to make the said writing obligatory in the declaration mentioned. And the defendant further saith, that the said corrupt and unlawful agreement having been so made as aforesaid, afterwards, to wit, on the day and year aforesaid, in the pursuance thereof, the plaintiff did make and appoint the said John Mercer his deputy sheriff of the said Western District, upon the terms and agreements aforesaid; and for the securing the same, the defendant then, to wit, on the day and year in the said declaration in that behalf mentioned, did seal, and as his act and deed deliver the said writing obligatory in the declaration mentioned. And the plaintiff thereupon then received of and from the defendant the said supposed writing obligatory, whereby the said supposed writing obligatory was and is utterly void in law, and this the defendant is ready to verify, &c.

Demurrer. That it is not in and by the said last plea shewn how or in what respect the said agreement is unlawful; that the said agreement in the said plea mentioned, is not shewn to be a corrupt and unlawful agreement within the meaning of any statute now in force in this province in that behalf; that the office of sheriff is not an office touching or concerning the administration of justice, within the intent and meaning of any statute now in force in this province; that the office of deputy sheriff is not an office touching or concerning the administration of justice, so as to make the agreement in the said last plea mentioned unlawful as in that plea alleged; that there is no statute in force in this province, which applies to the case of a sheriff making such an agreement with his deputy as in the said plea mentioned, so as to make the same void; that the said bond or writing obligatory is not void in law as in the said plea is alleged; that the said writing obligatory is not rendered void in law, by being given in pursuance of the said agreement in the said last plea



mentioned as in that plea is alleged; that it is not in and by the said last plea shewn, how or in what respect the said bond or writing obligatory became and was or is void as in that plea is alleged; that it is not in and by the said last plea shewn, that the said writing obligatory was given for the performance of any unlawful agreement.

*Cameron, Sol. Gen.*, for the demurrer, referred to the 23 Henry VI. ch. 9, sec. 1; 5 & 6 Ed. VI. ch. 16; 4 Hen. IV. ch. 5; 3 Geo. I. ch. 11, sec. 15; Chitty's Statutes; Impey's Sheriff, p. 8; 49 Geo. III. ch. 126.

*Harrison, Q. C.*, contra, referred to the same statutes, and to 1 Freeman, 19; 9 B. & C. 462; 7 Taunt. 246; 13 Ves. 213; Cro. Jac. 612.

ROBINSON, C. J., delivered the judgment of the court.

It is only on the demurrer to the fifth plea, which involves the principal question in the cause, that the parties desire our judgment; and upon that we do not consider that there can be any doubt. The 49 Geo. III., ch. 126, is so comprehensive as to leave no escape from its provisions; it extends "*to all offices in the gift of the crown or deputations to such offices,*" which clearly must include sheriffs and their deputies.

The 10th section of the act expressly allows, that in case of deputation "any allowance, salary or payment may be made or agreed to be made by or to such principal or deputy respectively, *out of the fees or profits of the office.*"

The objection to the arrangement, which according to the fifth plea this bond was given to secure, is, that it was intended to assure to the sheriff a certain fixed salary or allowance, to be paid to him by his deputy, whether the fees of the office would yield it or not, instead of being made payable as the act allows, *out of the fees or profits of the office.*

There can be no question about this statute being in force here, for it is expressly made applicable in all his Majesty's dominions, colonies or plantations, and with so express a provision on the subject undoubtedly applying, it seems unnecessary to consider how the plea might have stood upon the 3 Geo. I., ch. 15, sec. 10, or any of the earlier statutes, 4 Henry VI., ch. 5; 23 Henry VI., ch. 9; 5 & 6 Edward VI., ch. 16.

*Per Cur.*—Judgment for the demurrer to the fifth plea.

---

#### MALLOCH V. ANDERSON.

Where A. has expressly dedicated by deed certain lands for the purposes of a public road, and the public have adopted such dedication by user, A.'s subsequent conveyance of the land to B. cannot controul the prior dedication.

*Trespass quare clausum fregit.*

This action was brought to try the right of the plaintiff to a strip of ground in the town of Brockville, which the plaintiff claimed to be part of his town lot in the said town, and which the defendant maintained was part of a public highway between the plaintiff's property and that of his neighbour towards the south.

There were special pleas in the record justifying under the alleged facts, that the *locus in quo* was a common highway, and that the defendant, as a street surveyor in discharge of his duty, committed the act complained of as a trespasser, that was, throwing down the plaintiff's fence, in order to remove all obstructions to the use of the highway.

The ground in dispute was a strip of a few feet in width, and the question was, whether it formed part of a cross street intended to be forty feet wide, leading from St. Andrew's street to the Court House Avenue, or whether the true position of the street was not wholly south of the land in dispute.

Evidence was received on both sides, and by assent of the parties the jury were directed to assess the damages, which they did at 3*l.*, subject to the opinion of the court, whether upon the evidence the position of the street was to be determined by the boundaries and courses contained in certain deeds produced at the trial, or whether the *locus in quo* had not become a public highway, either by express dedication of the owner of the fee, or by user and implied dedication, or by act of the justices in quarter sessions; and leave was reserved to enter a nonsuit or verdict for the plaintiff or the defendant, as might in the opinion of the court be right.

*Richards* of Brockville, for the plaintiff, cited 5 B. & Al. 454; *Doe Smith v. Leavens*, 3 U. C. R. 411; 8 A. & E. 99; 5 C. & P. 464; 10 M. & W. 830; 6 Q. B. R. 904; 1 B. & Ad. 36; 5 Taunt. 125; 1 C. & Kir. 125.

The *Hon. R. B. Sullivan*, for the defendant, contended, that the deeds subsequently given by Buell could not controul his previous dedication, which was express and not left to be implied from user; that if they did interfere with the street as dedicated that was immaterial, for though they might transfer the soil they could not authorize the assignee to obstruct a clearly dedicated road.

ROBINSON, C. J.—It appeared to me upon the evidence at the trial, and I have now no doubt, that there was clearly shewn to have been such a dedication of forty feet for a highway south of one Hungerford's fence, as could not be overcome by any subsequent act of Mr. Buell in making, some years after that dedication, a deed containing a description which may appear to be inconsistent with that dedication.

The exact position of the fence which was to bound the highway on the north, was clearly made out. The space thus given up for a road lay open and accessible to the public for many years, and until the defendant enclosed it. It was understood to be a highway by Mr. Sherwood, the former proprietor, whose interest the plaintiff in this action acquired, and was acquiesced in as such by him, and the rights and possession of others were dependent upon the dedication, which having been thus expressly and deliberately made could not be revoked.

That the public had little occasion to use this cross street up to the time when the contest arose, and that there may never have been and may never require to be an actual travelled tract over the whole width of forty feet, nor over that particular part of it which lies next to the plaintiff's lot, makes no difference in the legal right which the public has acquired; and it is satisfactory to see from the evidence, that it was not necessary for the plaintiff to shut out the public from the few feet which had before lain open to their use, in order to obtain, either what the predecessors in his chain of title had held or claimed, or the full quantity of land which his deed assured to him. The verdict should, in my opinion, be entered for the defendant, who proved his plea of justification.

MACAULAY, J.—The plaintiff's south boundary according to the deeds is 600 feet from the main street, whereas according to the evidence the line he claims is 611 feet and upwards. The first point is the north-west corner of the eastern lot 10 chains 40 links or  $719\frac{1}{3}$  feet from the main street, whereas 10 chains 40 links is not  $719\frac{1}{3}$  feet nor even 700; the distances in the other deeds with 40 feet allowance for road would make such corner 715 feet from the main street, difference  $4\frac{2}{3}$  feet.

The fourth deed, 16th April, 1821, supposes contents to be 7500 square feet, shewing that the tract was intended to be a square of 100 feet by 75 feet.

So the deed to Easton is for 10,000 square feet, which would indicate a square of 100 by 100 feet.

There is a surplus apparently, but the distances are not all given. The question seems reduced to one of fact, What was laid out as the road? And I think the evidence shews, that the plaintiff has encroached on a part of that which was dedicated to and adopted by the public as a highway, and which is not included in his title deeds.

JONES, J.—The question is, was the road dedicated to the public by the owner in fee, or was it laid out under the statute when the plaintiff placed his fence?

I think there is no doubt from the evidence that it was so dedicated, and dedicated according to law, and therefore the plaintiff must fail in this action.

The testimony fully establishes the fact, that the northern limit of the road was where the fence stood on the south side of the Hungerford lot, and the testimony of Mr. Sherwood proves that a line extended from the Hungerford fence, as the course of that fence was the front of the plaintiff's lot, of which the witness Sherwood was himself once the proprietor and occupant, and therefore Mr. Malloch, by removing his fence south, encroached upon the street. Any proof by the description of the various deeds from William Buell, as shewing his intention to have been different, cannot alter the road, when there is express proof of dedication and a subsequent establishment by law of the road according to such dedication.

*Per Cur.*—Postea to the defendant.

#### BANK OF UPPER CANADA V. SMITH.

What is or is not a sufficient notice of the dishonour of a bill or note, when the facts are undisputed, is a question of law.

The holder of a bill or note need not shew the notice of dishonour to have been absolutely received; due diligence in sending it is sufficient.

For the statement of this case, and the argument, see 3 U. C. R. page 358.

A verdict was a second time rendered for the defendant, which the plaintiffs moved to set aside on the law and evidence.

ROBINSON, C. J.—It is unfortunate, that in this case, the jury has not given effect to what was stated to them by the learned judge at the trial to be the law of the land, and especially in a case respecting a commercial transaction of this kind, where it is important that the principles of law should not only be clearly understood but be strictly acted upon,



otherwise the confidence in negotiable paper, and consequently the facilities of business, would be materially impaired.

The amount is considerable, and for all that appears this defendant may be the only responsible party among those on whose credit the money was advanced.

The law too which regulates the transmission of notices, explained at the trial, is in itself so reasonable, that it seems difficult to understand how it could appear otherwise to any jury.

The law and practice, on the point on which this case turns, is very minutely stated in Story's valuable Treatise on Promissory Notes, sections 342-3, and he refers to a case very like the present in the highest court in the United States, in which the notice addressed and sent as this was was held sufficient.—*Bank of the United States v. Carneal*.

Nothing has been, nor, as we think, can be found in any English authority, that would shew the parties holding this note not to have done what the law required for giving notice of nonpayment to the indorser.

It is difficult to reconcile it to one's sense of what the due administration of justice requires, that the holders of a note should be unable to obtain a verdict against an indorser on whose credit they advanced the money intended to be secured by it, from an idea that the indorser is discharged for want of notice, when the holders sent the notice promptly in such a manner by the post as was shewn to have been ordinarily adopted in communicating with the defendant, and voluntarily adopted by himself to suit his own convenience.

MACAULAY, J.—The question is, whether the notice is sufficient. It did not appear whether the defendant would have received the notice through the Eckfrid office any earlier than through Mosa. The *Mosa* office is beyond the defendant's residence from London, whence the notice was sent; the Eckfrid office is between London and the defendant's.

The plaintiff need not shew notice *absolutely* received, but due diligence to give such notice; and depositing a letter in the post-office within the time properly directed, is due diligence, whether the post miscarry or not, and it is a question for the jury.—1 R. & M. 249, *Mann v. Moors*; 1 Mon. & Rob. 320, *Siggers v. Brown*.

JONES, J.—Where the facts are undisputed, what is or is not sufficient notice of the dishonour of a bill or note, is a question of law; and here the learned judge having directed the jury, that in his opinion the notice was sufficient, I think there should be a new trial without costs.—*Darbishire v. Parker*, 6 East. 9.

*Per Cur.*—Rule absolute for new trial without costs.

---

#### DOE DEM RICHARDSON V. DAFOE.

The mere fact of a vendor continuing in possession of land, without more being shewn, does not entitle him to a demand of possession before bringing an ejectment.

Ejectment for lot No. 7 in the 11th concession of Markham. The plaintiff proved a deed, dated the 29th of January, 1844, from the defendant, to W. H. Boulton, Esq., of these premises; also a deed from Mr. Boulton to the lessor of the plaintiff, dated 1st April, 1847.

Both deeds were proved by the same subscribing witness, who swore *that, so far as he knew*, the defendant had always continued in possession since he made the deed to Mr. Boulton, but he did not profess to have any other knowledge of that fact, than that he had heard the lessor of the plaintiff say, that the defendant wanted to be paid for a field of wheat he had put in, before he would give up possession, and therefore he said he believed that the defendant had continued in possession.

The learned judge nonsuited the plaintiff, under the impression that, upon the evidence, a demand of possession was necessary before bringing the action.

*J. Lukin Robinson* moved to set aside the nonsuit, as contrary to law. There being no consent shewn by any one to defendant's remaining in possession after his sale to Boulton, he is not entitled to a demand.—*Roscoe*, 421 ; 2 *Campbell*, 505.

*J. Duggan* shewed cause. The defendant never gave up possession, and is entitled therefore to a demand.

ROBINSON, C. J., delivered the judgment of the court.

There seems to have been a misapprehension at the trial respecting the necessity of demanding possession in such a case as was proved.

A vendor merely continuing in possession, without more being shewn, cannot be in a more favorable situation than a mortgagor under similar circumstances. All that was proved was, that the defendant chose to say that *he wanted* to be paid for a field of wheat before he would give up possession, but no privity in regard to the possession was established, as between the vendor or his assignee and the defendant, nor any sufficient ground laid for inferring an assent to the vendor's continuing in possession.

It was not even shewn that the vendee knew that he was in possession at the time of his making the deed to the lessor of the plaintiff.

*Per Cur.*—Rule absolute.

#### WHYATT V. MARSH.

Where services are performed for a relative, or other person, upon a mere reliance that the party serving will share in his bounty under his will, such services do not afford the ground of an action, as upon an implied assumpsit to pay in money.

Assumpsit. Pleas, general issue and set-off.

Verdict for plaintiff, and 40*l.* 10*s.* damages.

Motion for a new trial upon the evidence.

The facts are fully stated in the judgment of the court.

*J. Lukin Robinson* moved for a new trial, and referred to 3 B. & C. 327.

*P. M. Vankoughnet* shewed cause, and cited 5 M. & W. 116 ; 2 *Campbell*, 45 ; 1 A. & E. 333.

ROBINSON, C. J., delivered the judgment of the court.

This case came before us upon an application for a new trial upon the evidence. The learned judge's charge is not complained of, and was such, I think, as the case properly called for. The plaintiff was proved to have worked for the defendant, his uncle, upon an understanding that, at his uncle's death, he was to have his farm. He went to live

with him in 1843, and, after working for him a considerable time, left him, for all that appears, capriciously and at least for no justifiable cause that was attempted to be shewn. Having thus acted, he turns round upon the defendant and brings this action to recover, as in an ordinary case, compensation for his labour in money.

If it had been shewn that the defendant unjustly turned him away after receiving his services for a time, or by his misconduct towards him in any way afforded him a fair pretence for abandoning him, then the case would have come within the same principle as that of *Phillips v. Jones*, 1 Ad. & Ell. 333, but the plaintiff shewed nothing of the kind.

It may be very true that the plaintiff had not that kind of contract with the defendant which he could have enforced in an action, for it did not seem that he had taken any written engagement; but he chose to rely upon the promise he received.

The evidence does not shew that the defendant had given him any reason to apprehend that it would not be faithfully fulfilled, if he should do his part, but the contrary; and whether the plaintiff had a strict legal remedy in his power or not, it is not the less true that he was laboring for the defendant, on an expectation of receiving his bounty at his death, and not under an implied engagement to be paid in money.

Where services are performed for a relative, or other person, upon a mere reliance that the party serving will share in his bounty under his will, it has always been held that such services do not afford the ground of an action as upon an implied assumpsit to pay in money; and this case is at least so much stronger that the plaintiff had an express promise, morally binding at least, to encourage him in his expectation, and therefore can with more justice be held to have labored on that consideration only, than those persons who have given their services upon mere undefined expectations and hope of bounty.

If the plaintiff in this case has lost the benefit of the promise which he had confided in, it seems, so far as the evidence gives us any information, to have been by his own fault solely.

This case is very different from that of *Bryant v. Flight*, 5 M. & W. 114, where there was no idea of payment in any other manner than by money. The decisions in that case and in *Taylor v. Brewer*, 1 M. & S. 290, are not to be reconciled with each other, but in both, the point to be determined was different in its nature from the present.

Upon a consideration of all the evidence and the charge which the jury received—not being able to say that the jury acted perversely, or that there was a misdirection—we grant a new trial only on the terms of paying costs.

*Per Cur.*—New trial on payment of costs.

---

#### TOSSELL ET AL. V. DICK ET AL.

The court will not, as a mere matter of indulgence, give a defendant a second chance of obtaining a verdict *on a plea in abatement*, where the evidence is conflicting, or leaves the fact of joint liability doubtful. *Secus*, if the verdict for the plaintiff is clearly contrary to law.

**Assumpsit.** Counts for work done and materials found, and account stated.



The defendants pleaded in abatement the nonjoinder of one William Shaw, and the plaintiffs replied, that the promises were not made jointly with William Shaw.

It was proved that on the 16th of July, 1846, the plaintiffs entered into a written contract with the six defendants who are sued, and with William Shaw ("the Building Committee of the Brock Street Presbyterian Church in Kingston") to build a church according to the specifications and plans annexed: and in the agreement it was provided that the committee might direct any alterations to be made while the work was in progress, the value of which should be added to the sum agreed to be paid.

The learned judge ruled that the action for such extra work could only be brought against the persons who were parties to the agreement, though such extra work may have been ordered by the architect or any one or more of the committee.

The jury found for the plaintiff, 31*l.* damages.

*K. McKenzie*, of Kingston, moved for a new trial on the law and evidence. He cited 3 Taunt. 307; 3 B. & Ad. —; 14 M. & W. 11.

*Henderson*, of Kingston, shewed cause, and cited 6 Taunt. 587; 4 D. & R. 241; 3 Wils. 18; 3 B. & C. 357; 15 L. J. N. S. 356; 2 C. & P. 409; 7 Bing. 110.

ROBINSON, C. J., delivered the judgment of the court.

The evidence was, that the wall was by the direction of the architect made three or four feet higher than had been at first intended. There was no pretence for the jury inferring that the alteration was not one for which all who signed the contract with the builder were liable, if any of them were. Shaw was one who executed the agreement as a joint contractor with the plaintiffs, and the agreement made all who executed it personally liable for what was done under it.

The alteration in question, or any other that might be thought desirable in the progress of the work, was within the discretion of the committee to direct or to sanction, and there was no evidence to show that upon any peculiar ground Shaw was not liable equally with the others.

Then this seems to be the case of a verdict upon the issue of Shaw being or not being a joint contractor distinctly contrary to law, for the written agreement made him as much liable as the others for all that could be claimed under it, and there was no evidence to vary that point: we are of opinion therefore that there should be a new trial without costs.

The case of *Shaw v. Hislop*, 4 D. & R. 241, cited in argument, is not against the relief prayed for, because there the court considered that there was a separate individual liability, from the nature of the transaction. And as to the strong expression by the court, that they knew no instance in which a new trial had been granted on payment of costs in a case wherein the defendant has pleaded in abatement, that does not amount to a declaration that the jury may in such cases take both the law and the fact into their own hands and deal with them as they please, but it means only, at the utmost, that the court will not, as a mere indulgence, give a defendant a second chance of obtaining a verdict on a plea in abatement, where the evidence is conflicting or leaves the fact doubtful.

*Per Cur.*—Rule absolute.

## STAFFORD V. WILLIAMS.

Where taxes have accrued upon the *whole* of a lot of land while it is undivided, and a distress can be made upon a *part* of the lot, no portion of the lot can be sold for such taxes.

Special case. The question submitted to the court was, whether taxes having accrued upon the *whole* of a lot while it was undivided, and a distress being upon a *part* of the lot, any portion of the lot could be sold for such taxes.

ROBINSON, C. J., delivered the judgment of the court.

I understand, from the statement of this case, that the land in question was sold to pay taxes which had accrued on the whole lot while it was undivided, and that being so, the whole and every portion of the sum in arrear was a charge upon the north half as well as upon the south half, and the consequence would of course follow, that both halves were in like manner equally subject to the same remedies for enforcing payment, that is, to be sold if there should be no distress upon the land, without distinction as to distress being on one part of the land more than another. It is admitted that on the north half there was distress; that distress then was liable; and no part of the lot could be sold on the ground that there was no distress on that particular part.

The consequence is that the sheriff's sale was contrary to law; and the plaintiff has no right to recover against the defendant the value of the land, as if the title were invalid.—Keate v. Clopton, 405; Sir O. Bridgeman's Reports.

*Per Cur.*—Postea to the defendant.

## CAMPBELL V. BLACK ET AL.

In an action for wrongfully dismissing the plaintiff, a school-teacher, a plea averring the dismissal of the plaintiff by a third party, authorized by law to do so, is bad, as being an argumentative denial of the wrong complained of.

Special action on the case for dismissing the plaintiff without cause from his employment as teacher of a school.

Plea. That defendants were duly appointed masters of the model school for the county of Middlesex. That as such masters they employed the plaintiff, having previously obtained the approval of Mr. Elliott, the County Superintendent of Common Schools for the county of Middlesex. That in pursuance thereof the plaintiff entered into his employment of teacher, and remained in such office till he was dismissed therefrom by the said Elliott, so being such Superintendent as aforesaid, as it was lawful for the said Elliott to do by virtue of the power and authority vested in him as Superintendent.

Demurrer. That plea was bad in neither confessing and avoiding nor traversing the dismissal of the plaintiff by the defendants.

ROBINSON, C. J., delivered the judgment of the court.

We consider the plaintiff entitled to judgment on this demurrer, for the plea is only an argumentative denial of the wrong complained of; just as if a defendant, who had been charged with a trespass, should plead that it was another person who did it, without expressly pleading that he was not guilty himself.

If the defence had been, that he was bound by law to observe the orders of the Superintendent, that the Superintendent directed him to discharge the plaintiff, and that he did so in compliance with his order, that would have been a plea in confession and avoidance, but whether good or not would have depended on another question, namely, whether his contract with the defendant, if absolute and unconditional, could be so defeated. Such a plea would not have been subject to the objection which has been taken against this, and which we think is fatal, namely, that it neither confesses and avoids, nor traverses the dismissal of the plaintiff by the defendant, which is the gist of the action.

*Per Cur.*—Judgment for plaintiff on demurrer.

### HAYWARD V. HARPER.

It is no ground of demurrer to write, by mistake, in the pleadings "plaintiff" instead of "defendant," where there can be no doubt as to what was meant.

In this case the point that came up on special demurrer was, whether a slip of the pen in writing "plaintiff" instead of "defendant" in a part of the pleadings where there could be no doubt as to what was meant, was a fatal error.

ROBINSON, C. J., delivered the judgment of the court.

We give judgment for the plaintiff on this demurrer. The grounds are certainly frivolous. The case of *Williams v. Jarman*, 13 M. & W. 128, is an authority for not giving way to the second objection, which is raised upon a mere slip of the pen in writing "plaintiff" instead of "defendant," in one part of the pleadings, where there could be no doubt as to what was meant; and the other objection appears to be of no consequence.

*Per Cur.*—Judgment for plaintiff on demurrer.

### BECKETT V. OILL.

Debt on bond, with a condition to be void if certain payments should be made at the times *stated in the condition*, with an averment, as a breach, *that 125*l.*, parcel of the sum demanded, was not paid, &c.* Demurrer to declaration. *Per Cur.*—Declaration bad, in not negating the payment of the money mentioned in the condition.

Debt on bond, conditioned that the same should be void if certain sums should be paid at the times *mentioned in the condition*, with an averment, as a breach, *that 125*l.*, parcel of the sum demanded, was not paid, &c.*

Demurrer. That it did not appear by the declaration that there was any breach of the condition.

*H. Eccles* for the demurrer, referred to *Sutherland v. Crysler*.

*J. Boulton* contra, cited 2 M. & W. 91.

ROBINSON, C. J., delivered the judgment of the court.

We are of opinion that the declaration in this case is insufficient, for it sets forth a bond with a condition to be void if certain payments should be made at the times stated in the condition, and then it does not charge that any one of those sums was not paid by the defendant,



according to the condition, but avers, as a breach, *that 125*l.*, parcel of the sum demanded, was not paid, &c.* But the sum demanded does not comprehend any of the sums mentioned in the condition.

It is the *penalty* of the bond that is demanded, not the money mentioned in the condition; and therefore the payment of the money mentioned in the condition is not in fact negatived, which is indispensable to the right to sue for the penalty. The declaration does not shew the condition broken.

*Per Cur.*—Judgment for defendant on demurrer.

DOE DEM. CUVILLIER ET AL. V. JAMES.

Where a demise in the declaration of ejectment is laid as joint, and the evidence shews a tenancy in common, the Judge at Nisi Prius has not the power, under the statute 7 Wm. IV. ch. 3, of allowing an amendment. *Semble*, that when an amendment is allowed, it should in fact be made before the verdict is recorded.

Ejectment on a mortgage.

The defendant objected that the lessors of the plaintiff were tenants in common and could not recover on a joint demise.

Application was made at the trial to amend.

The defendant objected that it could not be done, and relied on *Poole v. Errington*, 1 Ad. & Ell. 750; and *Doe dem. Anderson et al. v. Errington*, in this court, 1 U. C. R. 159.

The learned judge allowed the amendment, leaving it to the defendant to move against the verdict if it should be thought he had not authority to do so.

The case went on, and it was insisted at the trial that the amendment, if intended to be made, should be made before the verdict was taken; and the plaintiff's counsel was asked by the court, before the jury retired, whether it was made, and was told it had been. It seemed, however, that no amendment was actually made on the record, but only the leave given.

Verdict for the plaintiffs.

The *Hon. J. H. Cameron, Sol. Gen.*, moved to set the verdict aside, on two grounds. 1st. That the learned Judge could not legally permit the amendment. 2ndly. That at any rate, to avail the plaintiff, it should have been actually made before the verdict was taken. He cited 6 M. & W. 549; 8 L. T. 157, 517; 1 A. & E. 750; 1 U. C. R. 159.

The *Hon. J. E. Small* shewed cause. He contended that the application to amend being made before verdict and allowed, that was sufficient; that in 6 M. & W. 549, the application was not made, he conceived, before the verdict, which would make that case not in point here. The Judge had the power of exercising a discretion in making the amendment, and having done so he did not think the court would interfere.

ROBINSON, C. J., delivered the judgment of the court.

As to the legality of allowing such an amendment to be made at Nisi Prius. In the case referred to of *Doe dem. Anderson et al. v. Errington*, in this court, which occurred about three years ago, application was made to me at the trial to allow a precisely similar amendment, and I

declined it. The court, upon leave reserved to move for a nonsuit, if it should be found that a verdict upon a joint demise by tenants in common could not be sustained, made the rule absolute for a nonsuit; thereby only determining that the objection was fatal. Whether it might have been properly allowed to be cured, by the judge at the trial permitting an amendment to be made by substituting several demises for the joint demise, was not decided; because the court held there, as in other cases, that they could not review the exercise of the judge's discretion under the statute, when he refuses the amendment.

The learned judge who presided at the trial of the case before us having allowed the amendment, in order to try the question, we have now to consider upon this motion whether that was an excess of his authority. If it were not we should not interfere with the manner in which he has exercised his discretion.

In the case referred to, in which the application was made to me at the trial to substitute several demises for the joint demise on which the defendant had consented by the rule to go to trial, I thought it not such an amendment as would come within the letter or spirit of the statute 7 Wm. IV. ch. 3, because it cannot truly be said to be an amendment required for the purpose of making the plaintiff's allegations on the record of *any fact*, agree with the evidence which he had given, or was about to give at the trial of that fact, and that alone is the object of the provision.

The plaintiff had stated a joint demise by several persons; and the defendant, by the consent rule, had admitted his demise as he stated it. The admission constituted his evidence, and there was therefore no variance to be cured; for the demise, as he had chosen to state it, must be taken to be proved by the consent rule. If the ejectment had happened to have been in one of those cases in which it is necessary for the plaintiff to have a lease actually sealed, and to make entry on the premises, and if he had made in such case a joint lease, and had proceeded to prove it on the trial by the subscribing witness, he would then just have verified the statement of the demise as he had pleaded it, and he could have been in no danger of being nonsuited on the ground of variance, which inconvenience alone it is the object of the statute to relieve against. His difficulty would rather be, that the demise which he had laid and proved would not answer his purpose. So it is here, I think, where the demise, though not actually made, is stated as if it were, and where the defendant admits it to have been made as stated.

It was under this impression that I took such a case to be one to which the statute respecting amendments at *Nisi Prius* does not apply.

The only English case we can find, in which the same application was made, is that of *Doe ex dem. Poole v. Errington*, 1 Moo. & Rob. 343, where Mr. Justice Taunton refused it, and when the case afterwards came before the court in term, upon the propriety of the nonsuit, on account of the demise being joint, the court did not intimate whether in their opinion the amendment might not have been properly allowed, if the judge had been inclined to do so.

In *Doe dem. Edwards v. Leach*, 9 Dowl. 877, the court determined that an amendment could be allowed at the trial in the date of the demise. Much of what is there said by the court, would seem to shew

that they would have held such an amendment as has been allowed here to be within the power of the judge under the act; and I am not by any means certain, that if such an amendment were to be made in any case at *Nisi Prius*, in England, it would not be sustained, for there is a strong disposition to go to the utmost limit in giving to parties the benefit of the statute.

It does not appear, however, that the statute has yet in any case been so applied, and I am not clear that it can be with propriety; for there is this difference between the case before us and that of *Doe dem. Edwards v. Leach*, that in the latter case nothing was done inconsistent with the consent rule, which the judge at *Nisi Prius* cannot alter; for the rule does not apply to a demise made at one time more than another, but the amendment in this case would make the verdict and judgment have the effect of shewing a title in two persons, as tenants in common from a certain time, while the consent rule still stands as in a case in which the title of the same persons as joint tenants was in question.

I am of opinion that the amendment was not one that comes by proper construction within the power of the judge at the trial, and therefore that it ought not to have been made.

It could not follow that, as a matter of course, the verdict must be set aside, unless the defendant shews by affidavit that he has been prejudiced in his defence by the amendment (7 Dow. 23); at least that is the course which has been taken in England, though I must say I should think that where a fatal variance has only been cured by an amendment illegally made, it should be held to be as fatal as if no such amendment had been made; and considering the additional ground, that no such amendment was in fact made before the verdict was recorded, though it had been ordered, my opinion is that the rule should be made absolute. The effect of this will be to throw upon the plaintiff, in any similar case, the necessity of considering the nature of his title and what kind of demise is consistent with it.

MACAULAY, J., JONES, J., and McLEAN, J., concurred.

*Per Cur.*—Rule absolute.

---

#### MANDAMUS IN RE LAPENOTIERE.

*Per* MACAULAY, J., and JONES, J.—Attornies of this court not being barristers cannot as of right be heard as advocates in the *district courts* of this province.

ROBINSON, C. J., *dissentiente*.

The court, thus differing in opinion as to the right of attornies to practise as advocates in the district court, refused a mandamus to a judge of one of the district courts to admit an attorney to be heard therein as an advocate. The result of this decision seems to be, to leave it *discretionary* with the district judge, either to grant or refuse to attornies the privilege of practising as advocates in his court.

The question submitted to the court upon this motion for a mandamus is, whether an attorney of this court, not being a barrister, can claim as a right to be heard as an advocate in the district courts of this province.

Mr. Lapenotiere, an attorney of this court, filed an affidavit in support of an application for a mandamus to the judge of the district court of the District of Brock, in which he set forth, that although he had not been



called to the bar and is an attorney only, he had been usually allowed to act as an advocate in the district court; but that on a late occasion when he rose to conduct a cause in court, which he had instituted and brought to trial as attorney for the plaintiff, the counsel for the defendant objected that he ought not to be heard, grounding his objection on the 5th clause of the statute of this province 37 Geo. III., ch. 13, the first Law Society Act; and that the judge who presided sustained the objection and refused to hear him, and he was in consequence obliged to withdraw his record, and the case yet remained to be tried.

*Harrison, Q. C.* supported the issuing of the mandamus.

*Cameron, Sol. Gen.*, on behalf of the Law Society, *contra*.

The argument of counsel, the statutes and cases cited, fully appear in the judgment of the Chief Justice.

ROBINSON, C. J.—The question which has thus been raised, although it has not before been discussed in this court, has been agitated before this occasion in the district courts themselves, and I happen to be aware, that in the district court of the Western District, the present judge of that court, Mr. Chewett, was called upon to dispose of a similar objection to that raised against the privilege of Mr. Lapenotiere, and having seen the judgment delivered by him, I have the means of knowing that he addressed himself to the question with great industry of investigation, and discussed it with much ability, bringing himself to the conclusion, that attornies have the right to be heard as advocates in the district courts, though barristers present in the same court may possibly by analogy, with a courtesy observed in similar cases in England, be considered to have the privilege of pre-audience.

In considering the question it is proper to refer to the following statutes:—34 Geo. III., ch. 3; 34 Geo. III., ch. 4; 37 Geo. III., ch. 6, sec. 4; 37 Geo. III., ch. 13, sec. 5; 43 Geo. III., ch. 3, sec. 1; 55 Geo. III., ch. 15; 59 Geo. III., ch. 9; 2 Geo. IV., ch. 2, secs. 23, 27; 2 Geo. IV., ch. 5, sec. 2; 6 Will. IV., ch. 44; 7 Will. IV., ch. 4, sec. 2; 7 Will. IV., ch. 15; 4 & 5 Vic., ch. 24, sec. 9; 8 Vic., ch. 13, sec. 75 and table.

Not that all these acts, or indeed many of them, contain express provisions bearing upon the point, but because from their immediate connection with the office and practice of attornies, or with the constitution of the district court, it would not be safe to come to a conclusion without examining them. After having made this examination, I cannot say that the claim made by attornies, to be heard as advocates in the district courts, can be either conceded or withheld upon grounds that can be shewn to be quite clear and satisfactory.

I do not think that we can reasonably lay much stress upon the fact, that the District Court Acts, 34 Geo. III. ch. 3 2 Geo. IV., ch. 2, and 8 Vic., ch. 13, make provision apparently for the remuneration to be given to attornies for certain services which in the higher courts are only rendered by barristers, thereby as it is contended affording ground for inferring, that attornies were in the view of the legislature capable of rendering those services in the district courts; as for instance the item in the bill of costs of "brief and fee at trial, fee on argument for new trial or on "demurrer, every special motion, &c." Those and other charges for counsel are in all the courts taxed in the first instance to the attorney, being included in his bill as disbursements, which he has made when he

has not rendered the service himself, as in this country he may in general, the instances being rare in which the attorney is not also a barrister.

The argument besides would prove too much, for as the table of fees gives nothing to counsel for any service, if we were to take the heading of the table as any indication who was to perform the service, we should have to hold, that barristers were disqualified from practising in the district courts, which has never been imagined.

So also there seems to be no great weight in the argument, that where the District Court Act, 2 Geo. IV., ch. 2, sec. 23, uses the words "may in person or by his attorney move for a new trial," it must be taken to authorise attornies to move the court in term time for new trials, and so admits of their being heard as counsel; for many instances, I am persuaded, will be found where it is directed, that a certain act may be done by a party or his attorney, and where nevertheless it cannot be intended that the attorney, if the services of counsel should be required, is to be received to perform that service. We cannot be certain that anything more was meant, than that the party may in person (for that is commonly allowed in all courts,) move for a new trial, or that his attorney may make the application for him in such manner as the practice of the court requires; that is, that he may move through counsel, may instruct counsel when he cannot appear as an advocate himself.

In the first King's Bench Act the table of fees makes no distinction between counsel and attorney, but the fees on briefs and arguments are classed with those charges which clearly apply to attornies; but we cannot infer from thence, that in that court all who were attornies were, in that capacity alone, and without other qualification, privileged to be heard as counsel. This question must be taken up on other grounds, and we must consider that before Upper Canada became a separate province, if there were any persons resident within that part of the province of Quebec who exercised in any civil or criminal court the functions of an attorney or advocate, he did so by virtue of an appointment and under a system which seems to have made no distinction, for though the ordinance of the Governor and Council of Quebec passed in the year 1785, concerning "advocates, attornies, solicitors and notaries," enumerates those several classes of persons as distinct, yet it seems to have made the qualification and mode of admission to the degrees of barrister, advocate, solicitor, attorney or proctor-at-law, the same as to all, namely, a service of five years with some advocate or attorney duly admitted.

In 1794, three years after the division of the province, and when the district courts of Upper Canada were first established, the very next statute to that which created them made provision for enabling the Governor to admit at once, by licence, a limited number of gentlemen to practice the profession of the law in Upper Canada. This was a temporary act, made to remedy the inconvenience of the want of any person *duly authorised* to discharge these duties; and it enabled the Governor to license such sixteen persons as he might think best qualified, from their probity, character and condition in life, "to act as advocates and attornies in the conduct of all legal proceedings in this province," whose names were to be all inscribed in one roll.

The profession was on this footing when the first Law Society Act was passed, 37 Geo. III. ch. 13, which was extremely well calculated to

raise the character and ensure the respectability of the profession in Upper Canada, and has very satisfactorily fulfilled its object. That act first laid the foundation of the legal degree of barrister, to be obtained by certain formalities and in virtue of certain qualifications, and to which certain defined privileges were to be exclusively annexed, except indeed, that the legislature did considerably admit a saving clause in favor of those who were then practising.

It is upon the fifth clause of the Law Society Act that it seems to me the question of Mr. Lapenotiere's claim must turn, and it runs thus: "that no person, other than the present practitioners and those hereafter mentioned (which refers to a further saving in favor of persons then serving as articulated clerks), shall be permitted to practice *at the bar of any of his Majesty's courts in this province*, unless such person shall have been previously entered of and admitted into the law society," &c. &c.

Do those words embrace the district courts, which are inferior courts of local jurisdiction, and respecting which it is at least not clear that under the statute 34 Geo. III. ch. 3, they could be held to be even courts of record.

It seems to me that on general principles of law the words "*at the bar of any of his Majesty's courts in this province*," as used in the act, are applicable only to the superior court of record which then existed in Upper Canada, namely, the King's Bench, and to any other provincial courts of record of superior jurisdiction which might be afterwards created. I refer to Bacon's Abridgment, "Courts and their jurisdiction," D., and to Gregory's case, 6 Co. 20.

No doubt the district courts were the king's courts in a general sense, as the king is the fountain of justice; but in England, when the king's courts are spoken of with a view to conferring jurisdiction, it is the courts of record of the kingdom—the courts of record in Westminster—that are *propter excellentiam* conceived to be intended; and I consider that the legislature here used the words in that sense. We ought, I think, to presume that they did; and there is some evidence that the statute has been so construed by the public and the profession and by the legislature itself. For as it does appear in the affidavits before us that Mr. Lapenotiere had been before usually admitted without question to act as an advocate in the district courts, so I believe I may say that the same has been generally the course in other districts, from an early day, in the case of those individuals, few in number, who from one cause or another have been sworn in as attornies only, not being called to the bar.

The 4th & 5th Vic. ch. 24, sec. 9, gives evidence that the legislature has recognised such a privilege, when, in allowing to persons tried for felony permission to make full defence by counsel, they add, or "*by attorney in the courts where attornies practise as counsel*."

It is very probable that these words found their way into our statute by being copied, without especial consideration, from the similar enactment in England; but being there we must treat them as being advisedly used; and they seem to recognise that attornies may act as counsel in some criminal court in which felonies could be tried, and there is none such unless it be the general quarter sessions, in which the privilege of attornies to be heard as advocates can hardly rest on any ground



which would not equally entitle them to be heard in the district court, being a civil court of like confined jurisdiction in regard to locality, and certainly not higher in rank.

I have considered whether the provincial statute 43 Geo. III. ch. 3, has any effect on the question; but I do not see that it has. The second Law Society Act, 2 Geo. IV. ch. 5, sec. 2, does supply some ground of argument. The former Law Society Act, 37 Geo. 3, ch. 13, had provided for the society admitting *ad eundem* any persons who should be duly admitted to practice "at the bar of any of his Majesty's courts in England, Scotland, or Ireland." The society seems to have been afraid that under that form of expression persons might apply to be admitted who had been merely privileged to act as counsel in England, &c., in some courts of local jurisdiction; and in the new act, which we may suppose was passed in some measure at their instance, the language is more guarded, viz., "that it shall be lawful for any person having been duly called to practise at the bar of any of his Majesty's superior courts, *not having merely local jurisdiction* in England, &c., to be called by the society, &c."

The distinction is there made between "*his Majesty's courts*" and "*his Majesty's courts of local jurisdiction*," admitting that it might be reasonable to extend a privilege to those who had practised in the one, to which those who had practised in the other could have no fair claim; in other words, recognizing that his Majesty's courts and his Majesty's local courts should be looked upon in different lights. And this idea being kept in view while considering the effect of the 5th clause of the statute 37 Geo. III. ch. 13, on which this question turns, would have a bearing in favor of this application.

In point of fact I am correct, I believe, in saying, that even before the statute 2 Geo. IV. ch. 5, was passed, it was not admitted by the Law Society, nor considered by the court, that persons who had only been admitted to practise in courts of local jurisdiction in their own country, were entitled to be called to the bar in this province under the words "his Majesty's courts," &c., used in the former act.

I remember at least one such case with respect to a gentleman who came from Scotland. Then if the society would not admit that the words "*his Majesty's courts*" properly extended to inferior local courts, where the conferring a privilege was in question, it would follow, I think, that they could not hold the same words to extend to inferior local courts, where the question was about withholding a privilege.

I do not examine this question in connection with any thing that may have been done in England in respect to hearing or refusing to hear attornies as advocates in courts of local jurisdiction, because all must depend on the system in use in each country, and the foundations of such system with regard to the footing on which the legal profession rests, and with regard also to the constitution of the courts. And when such questions have been raised, they seem to have been generally treated as questions not *stricti juris*, but in regard to which much must be left to the discretion of the court in which they are debated.

My own deduction from the materials on which we have to form an opinion is, that attornies have, in this province, as the law stands, a fair claim to be heard as advocates in the district courts; but my brothers,

I believe, are not of that opinion, or not clearly satisfied of it. And in this point I fully agree with them, that it is more consistent with the interests of the public and the honor and credit of the profession, that the duties of counsel should be discharged, in the district courts as well as in this court, exclusively by gentlemen of the bar, of whom there is now no want in any of the districts, and with respect to whom there is a better ground of confidence that their qualifications will be such as their duties require. I concur also in thinking, that whenever on any application of this kind the ground is not perfectly clear and free from doubt, no mandamus should go; for we should not force a court of justice to allow a person to be heard who has not in the opinion of that court a right to the privilege, unless we can say that the case is too plain to leave room for a question, which I cannot say when my brothers do not admit the right.

MACAULAY, J.—The statute 37 Geo. III. ch. 13, sec. 8, enacted that no person (subject to certain exceptions, not including attornies) should be permitted to practise at the bar of any of his Majesty's courts in Upper Canada, unless such person should have been previously entered of and admitted into the Law Society, &c., and should have been duly called and admitted to the practice of the law as a barrister, according to the constitution and establishment thereof.

It does not appear to me that an attorney, not a barrister, can as of right claim to be heard as an advocate in the district courts, in the face of this express prohibition, if such courts come within the denomination of "*any of his Majesty's courts in this province.*"

All courts of record are the king's courts (3 Stephens's Commentary, 282-3); and the statute 8 Vic. ch. 13, creating the present district courts, establishes them as courts of law and record (see sec. 2); and section 48 empowers them to fine and imprison.

If the legislature in the wording of the tariff, or otherwise, intended them to enjoy the privilege claimed, an explanatory act is desirable. I do not feel at liberty to recognize it or to enforce it by mandamus, judging the intention of the parliament from the acts as they exist.

JONES, J., concurred in opinion with MR. JUSTICE MACAULAY.

*Per Cur.*—Mandamus refused.

#### SMALL, CORONER, &C., ON THE RELATION OF WALKER V. BIGGAR.

At a township meeting the first duty of the meeting is to elect a district councillor, and the town clerk *ex officio* may preside as chairman of the meeting until such councillor be chosen. The court therefore refused, upon an information in the nature of a *quo warranto*, to disturb the seat of a councillor who had been elected by the meeting, though under protest at the time by some of the electors, because the town clerk had insisted upon acting *ex officio* as chairman.

Information: "Be it remembered, that Charles Coxwell Small, Esq., coroner and attorney of our sovereign lady the Queen, in the court of our said lady the Queen before the Queen herself, who for our said lady the Queen prosecutes in this behalf in his proper person, comes into the court of our said lady the Queen before the Queen herself at

“Toronto, on the 1st day of said Hilary Term, and for our said lady the Queen, at the relation of William Walker, of the township of Brantford, in the Gore District, Esquire, according to the form of the statute in such case made and provided, giveth the court here to be informed and understand, that the District Council of the District of Gore, in that part of the Province of Canada formerly Upper Canada, now, are, and have been, since the first Monday in January, which was in the year of our Lord 1842, a body corporate and politic, in deed, fact and law, according to a certain act of the said Province, and passed on the 27th day of August, A. D. 1841, and entitled, ‘An act for the better internal government of that part of this Province which formerly constituted the Province of Upper Canada, by the establishment of local or municipal authorities therein.’ And that according to the form of the same act there ought to have been and still ought to be at the township of Brantford, aforesaid, in the Gore District, aforesaid, chosen and elected upon the first Monday of the month of January, A. D. 1846, according to the provisions of the said act, a member of the said District Council in and for the Township of Brantford, in the said Gore District, and being one of the Townships of the said Gore District; and that the office of a member of the said District Council for the said Township of Brantford, ever since the said first Monday in January, which was in the year of our Lord 1842, hath been and still is a public office and an office of great trust and pre-eminence within the said District of Gore, touching the rule and government of the said District of Gore, and the administration of public justice therein, that is to say, at the township of Brantford in the district aforesaid; and that Herbert Biggar, late of the township of Brantford in the District of Gore, aforesaid, gentleman, on the 10th day of February, in the ninth year of the reign of our sovereign lady Victoria, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, at the township of Brantford aforesaid, in the District of Gore aforesaid, did use and exercise, and thence continually afterwards to the time of exhibiting this information, hath there used and exercised, and still doth there use and exercise, without any legal warrant, royal grant or right whatsoever, the office of the member of the District Council, in and for the Gore District, for the said township of Brantford, and for and during all the time last aforesaid, hath there claimed and still doth claim, without any legal warrant, royal grant or right whatsoever, to be the member of the said District Council, in and for the township of Brantford, aforesaid, and to have, use and enjoy all the liberties, privileges and franchises to the said office belonging and appertaining, which said office, liberties, privileges and franchises, he the said Herbert Biggar for and during all the time last aforesaid, upon our said lady the Queen, without any legal warrant, royal grant or right whatsoever, hath usurped and still doth usurp, to wit, at the township of Brantford aforesaid, in the district aforesaid, in contempt of our said lady the Queen, to the great damage and prejudice of her royal prerogative, and against her crown and dignity.”

“And therefore the said coroner and attorney of our lady the Queen prayeth the consideration of the court here in the premises, and that



“ due process of law may be awarded against him the said Herbert Biggar in this behalf, to make him answer to our said lady the Queen, and shew by what authority he claims to have, use and enjoy the office, liberties, privileges and franchises, aforesaid.

Plea : “ And the said Herbert Biggar, by John Cameron his attorney, comes into court, and having heard the said information read, complains, that under colour of the premises therein contained he is greatly vexed and that unjustly; and that he does not think our lady the Queen ought to impeach him by reason of the premises aforesaid, because he says, that on the first Monday in January, to wit, on the 5th day of January, A. D. 1846, Joseph D. Clement then being the town clerk for the township of Brantford, in pursuance of the statute in such case made and provided, convened a meeting of the inhabitant freeholders and householders of the said township, for the purpose of electing and choosing a district councillor and other township officers for the township of Brantford in the said district, for the year of our Lord 1846, of which said meeting due notice was given by the said Joseph D. Clement as such town clerk as aforesaid, he being thereunto lawfully authorized, according to the form of the statute in such case made and provided; and that thereupon on the said first Monday in January, to wit, on the said 5th day of January, the said meeting of the said inhabitant freeholders and householders was duly convened at the hour of nine of the clock in the forenoon; and the said Joseph D. Clement, so being the town clerk, as aforesaid, and then presiding at the said meeting, having first duly taken the oath required by the statute to be taken by the presiding officers at such meetings :

“ The inhabitant freeholders and householders of the said township first proceeded to elect a district councillor for the said township of Brantford, to serve in the Municipal Council of the Gore District, for the year of our Lord 1846; and the said Herbert Biggar having been duly nominated and seconded, and a reasonable time, to wit, three-quarters of an hour having elapsed, and no poll having in the meantime been demanded by any candidate or by any three electors then present, he, the said Joseph D. Clement so presiding, as aforesaid, at the said meeting, publicly declared the said Herbert Biggar to be duly elected councillor for the said township of Brantford, in the Municipal Council of the Gore District, aforesaid :

“ By means of which said several premises, he the said Herbert Biggar having received due notice of his said election and being duly qualified, afterwards and within the time prescribed by the statute in that behalf, to wit, on the 8th day of January, in the year last aforesaid, before Nathan Gage, Esquire, one of the justices of the peace who had authorized such election, as aforesaid, took and subscribed the oath of allegiance to her Majesty, her heirs and successors, and also a certain oath of qualification, as is set forth and prescribed by the statute in such case made and provided. And the said Herbert Biggar afterwards, to wit, on the day and year last aforesaid, and from thence continually until the time of exhibiting the said information, became and was a district councillor for the said township of Brantford, in the Gore District, aforesaid; and for all the time in the said information mentioned, by virtue of the said election, used and exercised and still

"doth use and exercise the office of district councillor of the said district  
"for the said township, and still claimed and claims to be such councillor,  
"and to have, use and enjoy all the liberties, privileges and franchises  
"to the office of such councillor belonging and appertaining :

"Without this, that he the said Herbert Biggar, the said office, liberties and franchises, hath usurped or doth usurp, as by the said information is above supposed, all and singular which said matters and things he the said Herbert Biggar is ready to verify, as the court shall award."

"Wherefore he prays judgment, and that the said office, liberties, privileges and franchises by him claimed in form aforesaid, may be allowed and adjudged to him :

"And that he may be discharged and dismissed by the court hereof of and from the premises above charged upon him, &c."

Replication: "And the coroner and attorney of our said lady the Queen, who for our said lady the Queen in this behalf prosecuteth, having heard the plea of the said Herbert Biggar by him in manner and form aforesaid above pleaded in bar, for our said lady the Queen saith, that our said lady the Queen, by reason of anything by the said Herbert Biggar above in his plea alleged, ought not to be barred from having her aforesaid information against him the said Herbert Biggar, because protesting, that the said plea and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law, nevertheless for replication thereto saith, that immediately after the said meeting of inhabitant freeholders and householders was duly convened as in the said plea stated. And while the said Joseph D. Clement was presiding at the said meeting as town clerk as in plea stated, and before the nomination or election of the said Herbert Biggar as district councillor as in the said plea set forth, and in order that the said meeting might be duly and properly organized, one David Christie, an inhabitant freeholder and householder of the said township of Brantford, was duly nominated and seconded to preside at and to act as chairman at the said meeting, and the said Joseph D. Clement was then and there requested, by certain inhabitant freeholders and householders at the said meeting, to put such nomination to said meeting; and the said David Christie would then and there have been duly chosen to act as chairman at the said meeting had such nomination been received and put, but the said Joseph D. Clement, so being such town clerk as aforesaid, and so presiding at the said meeting as aforesaid, wholly and wrongfully neglected and refused to receive or entertain the said nomination of the said David Christie, as aforesaid, or to put such nomination to the said meeting, or to allow the said David Christie or any one else to be put in nomination or chosen as chairman of such meeting, as aforesaid, but then and there and during all the time of such election for district councillor, as aforesaid, acted as chairman of such meeting and presided at said election, notwithstanding such nomination as aforesaid, and contrary to the express desire and wish of the said inhabitant freeholders and householders at the said meeting, all and singular which said matters and things the said coroner and attorney of our lady the Queen, for our said lady the Queen, is ready to verify."

"Wherefore he prays judgment, and that the said Herbert Biggar

"may be convicted of the premises above charged upon him, and may be adjudged and excluded of and from the office, privileges and franchises aforesaid."

There were other issues taken on the averments in the plea, which were subsequently abandoned.

Demurrer to replication, that the statutes relating to the appointment and duties of town clerk expressly and impliedly provide, that the town clerk shall preside at the meeting to be assembled for the purpose of electing township officers *until* the district councillor be *first* elected.

The pleadings are given at some length, as it is supposed they may be useful to the profession in similar cases.

*G. A. Phillpotts*, in support of the *quo warranto*.

*J. Lukin Robinson*, contra.

The arguments of counsel fully appear in the judgment of the Chief Justice.

ROBINSON, C. J.—When the pleadings in this case were before us last term, we considered that the plea set forth an apparently good election, that the supposed defects in form, which the relator had made the ground of his special demurrer did not exist, and that the defendant was therefore entitled to judgment; but we allowed the relator to amend his pleadings in order that he might, by replying to the plea, bring out those facts on which he relied for shewing the election to be void; we knew what these were from seeing them stated in the affidavits upon which we had granted the information, but they had not been placed upon the record, and in consequence the question, which we understood was to be brought before us for decision upon the information, was concealed from view.

The counsel for the complainant seemed to think then, as he has intimated on the argument of this demurrer, that we could and ought to have assumed upon the record as it stood before us, that the mere fact of the town clerk having presided at the election (though the statute 4 & 5 Vic., ch. 10, sec. 6 & 7, expressly admits of his so presiding,) necessarily made the election illegal. But the question intended to be raised was, whether if the inhabitant freeholders shall at the township meeting, before the district councillor is chosen, desire to elect a chairman, and if a person shall be proposed and seconded for that purpose, it is not the indispensable duty of the town clerk to allow the chairman to be first chosen, in which case such chairman and he only could preside at the election of a district councillor to be afterwards made.

That question was not raised by the pleadings as they stood before, but it is now raised by the replication to the defendant's plea, and that replication being demurred to, we are to consider whether it is sufficient to destroy the defendant's right.

The replication tenders several issues intended to be distinct answers to the plea, but as no objection has been taken by special demurrer on the ground of duplicity, we need not consider how far the replication is warranted by the course of pleading in cases of *quo warranto*, nor compare it with the pleadings in the case of *Rex v. Knight*, 4 T. R. 419, and referring to what is said by Mr. Justice Buller in regard to the qualification of the privilege of replying several matters to the plea. It has not been disputed in the argument, that the election in this case must



be determined to be void if it were not held before the officer authorised to hold it; that point indeed seems clear from the case of *Rex v. Smart*, 4 Burr. 2241, and other cases.

Then as to the question upon which our decision is expected to turn, I confess it does not appear to me to be one on which we can give a perfectly satisfactory opinion, because the statute 4 & 5 Vic., ch. 10, is as regards this point not quite reconcilable with itself; we have first to consider that it is under the statute of Upper Canada, 1 Vic., ch. 21, that the township meetings are held, and the 2nd clause of that act says, that at every such meeting "*the town clerk shall preside until a chairman be chosen.*" Then comes the District Council Act, 4 & 5 Vic., ch. 10, which requires a district councillor or councillors to be elected for each township at the township meetings to be so holden; and at which the clerk (as directed by the former act) "*is to preside until a chairman be chosen.*" In what manner or at what point of time the question for election of chairman is to be put at the meeting is not expressed, and if it rested wholly on that act we must infer, I think, that the legislature intended the town meeting to be organized by choosing a chairman before it proceeded to business, and the mode of choosing must be by some one of the voters proposing a chairman, and a vote being taken upon it.

Then how does the 4 & 5 Vic., ch. 10, affect the question? The provisions respecting the election of district councillors begin with the fifth clause; that contains nothing which touches the point who is to preside. The sixth clause may seem to do so, indirectly at least, when it directs, that the town clerk shall at the election administer the oath to each voter respecting his identity with the person of the same name whom he finds entered in the assessment list; but the inference is not a necessary one, that he must therefore be the presiding officer, for he might properly be expected to attend as having the custody of the list, and he might be authorised to administer the oath as acting in aid of the presiding officer, without being such himself. But I notice that the clause gives the town clerk not merely *authority* to *administer* but a discretion to *require* the oath to be taken, and that would certainly seem to afford an argument, that the legislature intended him to be the person holding the election. Then the 7th clause contains the express words on this point which the defendant relies on, namely, "*that the inhabitants shall at every such meeting first proceed to the election of a councillor*" This he contends requires or at least authorises the election to be proceeded in before a chairman is chosen, because that is to be the first proceeding. It is said on the other side, that nothing more can be reasonably held to be meant by these words, than that the election shall be the first matter of business to be taken up after the meeting shall be fully organised by choosing a chairman. The same clause requires that full lists "*shall be kept at the election by the town clerk or person presiding at the same.*" This is a recognition that he *may* preside, and not a requisition that he *must*. When we find the legislature using the words *or person presiding*, we might at first conclude that they used them in reference only to the contingency, that before the election should be proceeded in some one might propose a chairman, and that then according to 1 Vic., ch. 21, the clerk would cease to preside,

and they did perhaps so intend; but we must consider that by the third clause of that same act it is provided, that if the town clerk shall refuse or neglect to convene a meeting on the regular day, the freeholders may meet of themselves, and in his absence *choose* a chairman, and there is room to contend that the act means nothing more than this, when from such a cause there may be no town clerk at the meeting, the chairman presiding may hold the election.

As to the argument, that the 8th and 9th clauses would seem to be framed with the intention that the town clerk should hold the election, there is only this much force in it, that he, knowing he is to hold the election, could conveniently take the oath before some justice before the election, which a chairman to be yet chosen could not do preparatory to the meeting, because until the householders were assembled it could not be known whom they would choose as chairman; and the construction would be inconvenient which would impose upon him the necessity of immediately taking the oath before a justice, since there might be no justice present. And then when the 9th clause towards the end provides, "~~that~~ all justices of the peace residing in the township wherein the election is held shall, upon being *notified in writing by such person* *presiding*, attend at such election, for the purpose of preserving peace and order thereat," we cannot fail to consider, that while reasonable notice could be conveniently given by the town clerk before the day of meeting, if he were the person intended by the *person presiding*, it would be a very inconvenient provision that should require the notice to be given by a person to be chosen after the inhabitants had assembled, because then delay must be incurred, the parties must be hurried instantly from home upon the summons, and might not be able to reach the place of election until after all occasion for their services in keeping order had ceased.

The 17th and 18th clauses however, it seems to me, are more material than these to the decision of this question, for in these while the legislature makes provisions for elections to fill up vacancies, which elections are like the others to be made by all the inhabitant freeholders and householders to be assembled for that purpose, and their using no other words that contemplate any other person as presiding, the legislature directs that the town clerk and no one else shall hold the election.

One can imagine no good reason for the election being absolutely committed to the town clerk as the presiding officer on these occasions more than on others; and when this consideration is coupled with the authority given to the town clerk in the 6th clause, to require any voters to be sworn, there seems certainly much reason for believing that the legislature intended the town clerk, when he was present holding a town meeting, to proceed first to the election of a councillor; and that where they use in the 7th and 8th clauses the words "or person presiding" they may have done so merely from the recollection that the statute 1 Vic., ch. 21, had authorised and directed, that when the town clerk refused or neglected to call the annual meeting, the inhabitants might nevertheless assemble, appoint a chairman and go on with the business. In any such case there would be no person but the chairman presiding at the meeting to hold the election, and that supplies a sufficient reason for the legislature having used the double form of expression. If that be

the reasonable construction then the course would be, that according to the 7th clause of the District Council Act, "*the inhabitants should first proceed to the election of a district councillor*" which would satisfy that clause; and then that the town clerk would continue to preside until a chairman be chosen, which would comply with the 2nd clause of 1st Vic., ch. 21. If, on the other hand, so soon as the inhabitants are assembled under the 1st Vic., ch. 21, it is competent to them to choose a chairman notwithstanding the 7th clause of the District Council Act directs that they shall first proceed to the election of a councillor, then there was a right to insist in this case, that the motion to appoint a chairman should be put and decided upon, and the person who might be chosen would be the officer to hold the election and not the town clerk. The legislature would have left no room for doubt on the point if they had said, that the freeholders should at every such meeting proceed to the election of a councillor before entering on any other business, except the appointment of a chairman when that should be desired by them.

It is necessary for us, however, now to decide upon the act as it stands, and though we thought it proper to grant the information in order that the question might be fully discussed and placed upon record; and though when we did grant it, it was with a strong impression in my own mind, that the proceeding with the election before a chairman was chosen, when a person had been proposed and seconded to fill the office of chairman, was irregular, yet now having maturely examined the act, and considered the effect of all the provisions bearing on the question, I do not feel warranted in adjudging that the defendant has usurped the office. Before we could so pronounce we must find the point clear of doubt; but it seems to me, that the arguments upon the face of the statute in favour of the election being held by the town clerk are stronger than those on the other side. The District Council Act, as being the last enactment, will of course prevail over anything contained in the 1 Vic., ch. 21, in any respect where it is evidently inconsistent with it, and when we see it there provided, that the inhabitants shall at their meeting first proceed to the election of a councillor, there is no difficulty in saying that that will admit of the election being proceeded in, before the election of a chairman or any other matter whatever, if it shall seem to have been so intended. There is more, I think, to shew that to be the intention than the contrary; and there is this further consideration, that I believe if it were proposed to the legislature as a question, whether they would think it more expedient as regarded the peaceful conduct of the election for a district councillor, and the assurance of an equal chance to all parties, that a known officer should preside who had nothing more to do with that election than other matters, or that that side which happened to muster the strongest on the ground, probably with a view to that election and animated by political or party feelings, should begin by putting one of their own number in the chair to act as moderator between them, they would declare in favour of the former course.

The statute does, I think, afford a good deal of evidence that such was the intention, or why should it be provided, that the town clerk might require any of the voters to be sworn, when his interposing for that purpose would seem an inconvenient and officious intermeddling if



he were not to be the person presiding at the election. In my opinion our judgment should be for the defendant on the demurrer on the ground on which it has been argued.

MACAULAY, J.—Upon consideration, and taking the acts together as *in pari materiâ*, I am disposed to think that (although not expressly so declared) the legislature intended that the clerk should be *ex officio* returning officer, as it were, in the election of district councillors for their respective townships.

The 5th and 7th, 17th and 18th sections strongly indicate this intention, and import that the clerk was to officiate when present. In the event of his absence some other person might be appointed to preside, but there are reasons why it might be deemed more expedient, that the clerk should preside and proceed at once to the election of a councillor, rather than that a contest should previously arise who should be chairman.

The assembly, strictly speaking, would be organized as a meeting when the clerk took the chair, which he must do even for the election of a chairman, and when organized the act seems to say, that the meeting shall first proceed to the election of a councillor. Considering the period of time allowed for taking a poll, the power to require and administer the oath to the voters, the person who is to receive the lists, the importance of proceeding promptly with the election, which must precede all the other business for which the meeting is convened, the supposed indifference of the clerk of the preceding year in comparison with a chairman appointed on the spot by a majority of the electors then present, possibly after a contest between opposing nominees, with other considerations, induces me to believe, that we best give effect to the intention of the legislature (though imperfectly expressed) in holding the present election regular..

No doubt the clerk might preside with the assent of the meeting; the only question is, whether he has a right to do so by first proceeding to the election of a councillor before calling for the appointment of a chairman, and although others may propose to appoint one to officiate in his stead. Upon the whole I think it better to hold that he may do so. To whom would the mandamus go to hold an election, if neglected or omitted by the clerk on the meeting of the first Monday in January.

JONES, J., and McLEAN, J., concurred.

*Per Cur.*—Judgment in favour of the demurrer.

---

#### MAIR V. HOLTON.

*Semble*, that a principal, for whose benefit a contract was made by his agent, may sue the defendant in his (the principal's) own name, though the defendant may have known nothing of the principal's interest in the subject matter of the contract at the time.

A receipt given and accepted for the delivery of flour is not conclusive upon the party accepting it.

Assumpsit upon a special agreement to deliver flour (250 barrels) within a reasonable time at 25s. per barrel, charging as a breach, that although the plaintiff had paid the price to the defendant, yet that the defendant had only delivered 90 barrels, and had wholly failed to deliver the other 160 barrels of flour.

In a second count the plaintiff sued for not delivering 250 barrels of

flour bargained and sold by the defendant to him, and which he alleged he paid for.

Common counts were added.

The defendant pleaded; 1st, general issue.

2ndly, To first count, that the defendant did deliver the 160 barrels of flour according to the agreement.

3rdly, To second count, that the defendant did deliver the 250 barrels according to his agreement.

The plaintiff proved by a witness, Judd, that in January, 1847, he agreed verbally with the defendant to buy of him 250 barrels of fine flour at 25s. a barrel, to be paid for on delivery, and that he afterwards paid him the whole amount, and for a few barrels over; that he paid him at one time 200*l.* being for 160 barrels supposed to be delivered; that he was at that time employed by the plaintiff to purchase flour for him, and that the money was the plaintiff's which he paid for the flour; that on the 2nd February, 1847, a few days after the agreement made, the defendant brought him a receipt signed by one Colter as follows, "received in store from A. Judd (the witness) 160 barrels of fine flour "from E. W. Holton;" that he had made no particular arrangement with the defendant as to where the flour should be stored, and taking it for granted that the flour was actually deposited with Colter, he treated it as so much delivered on Holton's account, and paid him for it according to the agreement.

The witness swore that Colter was in fact at that time receiving flour for witness and storing it in witness' own store, and that on seeing the receipt he supposed that the flour had been stored in witness' own stores, and did not discover that he had it not till he came to ship his flour the following spring, when he found the deficiency.

Then it appeared from the evidence, that although Colter gave this receipt he had not in fact received from Holton, for Judd, the flour mentioned in it, but having been found deficient in flour which he had receipted as delivered to him by various persons per Holton, he gave this receipt to charge himself as regarded Holton.

It was objected at the trial, that no action would lie except at the suit of Judd, who contracted with the defendant.

The learned judge ruled, that the plaintiff, for whose benefit the contract was made by Judd as his agent, could sue in his own name, though the defendant may have known nothing of his interest in the matter at the time. And there was evidence from Judd that he had been buying before and about that time a great deal of wheat for this plaintiff; that it was quite notorious he was doing so, and that he believed he mentioned it to the defendant, though he could not swear that he had. It was further urged, that Colter's receipt having been accepted by Judd and the flour mentioned in it paid for, the delivery of the quantity of the flour could not then be disputed.

The jury were told that if they were satisfied that the 160 barrels of flour had not in fact been delivered by the defendant, either through Colter or in any other way, they should find for the plaintiff. They found a verdict for the plaintiff, and 260*l.* damages.

A. Wilson moved for a new trial on the law and evidence, and for surprise, and for excess of damages.

*Richards* shewed cause, and cited Story on Agency, page 420. As to excessive damages, he referred to Sedgwick on Damages, 260; 1 Stark. 318; 1 C. & P. 412; 2 Taunt. 287; 15 M. & W. 136; 10 Jurist, 319.

ROBINSON, C. J., delivered the judgment of the court.

The only question, I think, that requires to be considered is, whether upon the evidence the 160 barrels of flour ought to have been held by the jury to have been in effect delivered by Holton in fulfilment of his contract. If that could have been so considered, then of course the defendant should have been found to have fulfilled his contract, and should have had a verdict.

There was some evidence that the defendant had means of knowing, when he contracted with Judd, that Judd was acting for and on behalf of this plaintiff, Mair. If there could be any doubt therefore, whether this case falls within the rule, that a principal, whose name is not disclosed at the time of the contract made for him with a third party by his agent, can sue upon such contract in his own name, that evidence would render it unnecessary to interfere with the verdict on that ground, and the defendant's counsel upon arguing the rule seemed to rest nothing on that point.

With respect to the grounds on which the plaintiff was allowed at the trial to recover for the 160 barrels not actually delivered, nothing could in my opinion be clearer or more plainly just.

The receipt given by Colter to Holton was not conclusive upon any one, it would not even be conclusive upon himself who signed it, but would always be capable of explanation unless under particular circumstances, as where a person gives a receipt expressly for the purpose of inducing another party to act upon it, by assuming a responsibility, or foregoing an advantage, there he may be held to be estopped afterwards from denying a fact which he has for such a purpose deliberately admitted; but with the full and clear explanation with which the evidence in this case was given to the jury at the trial, we must suppose that they were satisfied that there was not in fact any such flour delivered as was specified in that receipt, and if so, then this plaintiff would be defrauded of 160 barrels of flour which he had honestly paid for, trusting to that receipt, merely because it suited the interest of Mr. Coulter to obtain a discharge to himself, for some former unexplained deficiencies in the conduct of his business as a receiver of flour, by giving a receipt to Holton of so much flour as if stored with him by Holton on account of Judd, when in fact the receipt had no foundation in truth, and was, as the jury thought, a mere contrivance to cover so many barrels by putting in Holton's hands an acknowledgment of a delivery of flour on Judd's account, which was merely imaginary.

As to the amount of damages, if we could see clearly that there was an excess above what the jury could properly give, and to such an extent that it would be a relief to the defendant to give him a new trial on payment of costs, in order that he might endeavour to have the amount reduced, then we might interpose on that ground, but we do not find that to be the case.

*Per Cur.*—Rule discharged.



## DOE DEM. MCKENNY AND WIFE V. JOHNSON.

*Semble*, that a *satisfied* mortgage in fee to a third party cannot be set up by a stranger, as a subsisting title to defeat the true owner of the estate.

*Semble*, that a widow cannot be allowed to set up a mortgage to a third party against the heir of the husband.

Ejectment for land in Athol, rear part of lot No. 2 in 2nd concession east of East Lake.

It was proved that one Richard Johnson died seized of this land, leaving Mary, one of the lessors of the plaintiff, his daughter, surviving him, and also two other daughters by a second wife, but no sons.

For the defendant it was shewn, that Richard Johnson had, on the 27th of April, 1839, mortgaged this land in fee to one George Clark, to secure 35*l.* 5*s.*, made payable on 1st December then next, and she produced the mortgage, on which there were endorsed receipts for the interest as having been paid up to the 1st of January, 1840, by Richard Johnson, and several subsequent receipts for money paid by this defendant, who is the widow of Richard Johnson (his second wife), the last being dated in November, 1844, and expressed to be in full of debt and interest.

Upon this evidence a verdict was taken by consent for the plaintiff, subject to the opinion of the court :

1st. As to the extent of the interest of Mary McKenny in the land.

2ndly. The last receipt was signed by one Cain, whose authority to receive payment was not shewn ; and considering this, and admitting the receipts to be proof of payment as expressed in them, could the defendant, being the mortgagor's widow, and nothing more shewn, set up the mortgage to defeat the plaintiff's recovery ? She had been in possession always since her husband's death, and it was not shewn out of what funds she made the payments.

*FitzGerald* of Picton, for the plaintiff.

*D. G. Miller* for the defendant.

No authorities were cited.

ROBINSON, C. J., delivered the judgment of the court.

The lessors of the plaintiff can no doubt recover for the interest which Mrs. Kenny, the wife, has as one of the co-heiresses, and of course for no more. Recovering her portion as a parcener upon this separate demise will be a severance of the joint tenancy.

With respect to the defence set up under the mortgage, the widow cannot be regarded in the same light as a stranger entering into the possession after the husband's death. She is not a disseisor, for her possession commenced rightfully ; and she is to be looked upon as a tenant at sufferance, entitled as we may assume to remain on the estate on which her husband died, as his widow, for a limited period, under her right of quarantine, but staying without right beyond that period, her dower being, for all that appears, not yet assigned to her.

She has, while thus in possession, paid off a small sum that remained due on a mortgage in fee which her husband had given, and had taken it up ; and without having it assigned to her, but upon the mere production of the mortgage, which shews for itself that it is satisfied, she relies for protecting her against the action of her husband's heir, by

shewing that the right of possession, in consequence of the mortgage, is in some one else, that is, in the mortgagee. That the mortgage has been paid up to the right party, we may presume from the fact of its being surrendered into her hand. Whether she paid the whole or any part of the money from her own means, or from the profit of the estate of which she has continued in possession, is not shewn. Under such circumstances, she cannot in my opinion be allowed to set up the mortgage, in the first place, by reason of the position in which she stands as a person whose possession commenced rightfully and in privity with the ancestor of this claimant, McKenny; and in the next place, because even a stranger could not maintain himself in possession by setting up a satisfied mortgage made to a third party, under which the mortgagee had never himself taken possession.

The doctrine of Lord Mansfield, as to outstanding terms in trustees, whether mortgage terms or otherwise, which has been treated since his time as too questionable a departure from legal principles to be followed, has never, that I can find, been repudiated so wholly as to admit of a satisfied mortgage in fee being set up by a stranger as a subsisting title, to the prejudice of the true owner of the estate.

The subject is extensively discussed in Mr. Sugden's *Law of Vendors*, 3 vol. ch. 15, sec. 3, where he treats of surrender of terms, and points out the inconveniences and mischiefs which would follow from presuming a surrender of terms which had been created to attend the inheritance, since they are in many cases desired and intended to be kept alive, notwithstanding the object for which they were created in the first instance has been satisfied. But here is no term created to attend the inheritance, for any such purpose as has given rise to such arrangements among conveyancers in England. Here is a mortgage of the inheritance itself given simply to secure a debt which has been paid, and which, even before the debt was paid, had never been made use of by the mortgagee himself for disturbing the mortgagor in possession. If it were a subsisting security, then the case would be like that of *Doe dem. McBernie v. Lundy*, in this court, 1 Cam. 186, in which it was held that such a mortgage might be set up by a third party, to defeat the plaintiff in an ejectment. That is hard and seems not very reasonable, when the defendant has no connection with the mortgage; but the law has always been so administered in England as to admit of the defence. In some other countries which proceed in the main on the principles of the English common law, such a mode of defence is not permitted to a party. But here, where the mortgage had been given up by the mortgagee in consequence of its being satisfied, a reconveyance should have been presumed.

In England, *ex dem. Syburn v. Slade*, 4 T. R. 682, a conveyance from trustees was presumed because it was their duty under their trust to convey to the party when he became of age, which was but three or four years before. Lord Kenyon said it was what they were bound to do, and that it might be presumed they did their duty. So when a mortgagee has been paid his debt, it is his plain duty to reconvey; and, indeed, by our statute 4 Wm. IV. ch. 16, the formality of a reconveyance is not necessary, but a mere certificate of discharge registered in the county register has the same effect.

The case of *Doe dem. Brandon v. Calvert*, 5 Taunt. 170, may seem at first unfavourable to the plaintiff in this case, but it is not really so, because there was no proof of the mortgage having been satisfied; and mere lapse of time short of twenty years would not raise the presumption of payment, without which there could be no reason to presume reconveyance.

But the clearest ground, I think, is that the widow cannot be allowed to set up this title in a third party against the heir of the husband, for it will be presumed that she was in possession only in consequence of his prior estate.

*Doe dem Carr v. Billyard*, 3 Man. & R. 111, is in point upon that principle. If there is any hardship in the case, it can only be because the widow may have paid off the mortgage from her own funds; but there is no evidence of that; and if the fact was so, she should have taken an assignment of the mortgage, though I do not say that that would have left the case without question.—See *Wilson v. Witherby*, Bull. N. P. 110.

*Per Cur.*—Postea to the lessor of the plaintiff.

#### DOE DEM HAGERMAN V. STRONG ET AL.

The Absconding Debtor's Act, 2 Will. IV., ch. 5, is retrospective in its operation with respect to persons leaving the province before the act was passed. The fact, that the whole of a farm may have been sold by the sheriff for a debt, which one would suppose might have been satisfied by the sale of only a portion of it, is no ground to invalidate the sale.

It is no objection to a sale under a *fi. fa.*, that the writ directs a sum beyond the jurisdiction of the district court to be levied, which is stated in the writ to have been recovered for damages *and costs*.

*Quere.* Would the writ and sale be void, if it had been stated in the writ, that a sum exceeding the jurisdiction of the court had been recovered for damages only?

After land has been sold under a writ *valid upon the face of it*, though the judgment upon which the writ issued may be reversed for error appearing on the record, yet the defendant in the execution can only be restored to the money, not to the land.

If a writ of *fi. fa.* be tested in the lifetime of the debtor, it may be taken out and executed after his death.

It was proved at the trial, in 1847, that A. was last seen in the province in Dec., 1827, and was never afterwards heard of. A *fi. fa.* against A.'s lands was placed in the sheriff's hands on the 13th of July, 1833, tested the 29th of June, 1833. The heir of A. brought an action of ejectment against the purchaser under the sheriff's sale, and attempted to recover upon the ground, that after so many years (about 15) had elapsed over and above the seven years the law presumed A. to have been living since he was last heard of, the presumption that he did not die till the expiration of the 7th year, though there was no circumstance in evidence to shew that he died earlier, was at an end; and that it was incumbent on the purchaser at sheriff's sale to shew that he did not in fact die till after the 7th year; and that the jury should be directed to find whether he did or did not die within the term of seven years: but *Held, per Cur.*, that the proper direction to give the jury was, that at the end of seven years the fact of death was to be presumed and *not sooner*, unless there was some evidence affecting the probability of life continuing so long. *and also*, that it was incumbent on the heir of A., and not upon the purchaser under the *fi. fa.*, to shew when A. died.

Ejectment for parts of lot No. 35, in broken concession A. and the first concession of the township of Hamilton; the defendants defended for separate portions.



The land claimed was the property of John Hagerman, who died in possession and intestate, leaving his widow and family on the land, Abraham his eldest son and heir being then about fourteen years of age. He married a few years afterwards and continued to live upon the place till January, 1825, when being involved in some debts, though of no large amount, he left home, intending as he said to visit some relations in the State of New York, and not meaning to return until he should obtain the means of extricating himself from debt, which he said might probably be in two years. He had once before left his home in a similar manner and returned in about a year. Upon this last occasion he left home on horseback, spent a day with a relative of his on the road to Kingston, and went from thence to Kingston; but no certain account of him after he left Kingston had ever reached his family; at least that was the statement made by the witnesses for the plaintiff on the trial, among whom was his widow, who had since married again. He left his wife living on the farm, and a son, the lessor of the plaintiff, who claimed as his heir in the legal presumption that his father was dead intestate.

For the defendants it was sworn by two sisters of Abraham Hagerman, that their mother died about twenty years ago, having married again after the death of her husband, John Hagerman, and moved to the house of her second husband, one Russell, which was near the premises in question.

It was proved that their mother died on the 11th of May, 1826, and there seemed to be no dispute about the date. Then these two daughters of hers, who were sisters of Abraham Hagerman, and who remained living in Russell's house where their mother had died, swore, that on a day in the following winter, (which would be in the winter of 1827,) their brother, Abraham Hagerman, drove up to that house in a sleigh and went in, being muffled up with a shawl, enquired of them about his mother, and was told by them that she was dead; that he then asked whether Mary Hagerman (his wife) was living, and whether she was on the place with her children; that they told him she was, and that he soon after drove away.

These two sisters were respectively of the ages of eleven and thirteen at the time of this alleged visit. The elder of them swore, that she was quite sure it was her brother Abraham, and described him as having two moles upon his face; that she recollected his going from his home about three years before; that he left home for debt, and because he and his wife disagreed. She had no recollection of his having left home on more than one occasion, and would not swear positively that this might not have been his first absence; and she declared that she had no recollection of having informed Abraham's wife that she had seen her husband. She swore she never saw him afterwards.

The other sister, younger than this, swore to Abraham Hagerman's coming to the house in which she and her sister were living in the winter after her mother died, and gave the same account of his appearance—of his asking a few questions, and then going away; she said she thought at the time it was her brother, whose departure from home she remembered; she swore that she was about seven years old when he went, and that he had been three or four years away.

This daughter also swore that he had two moles on his face, and that

she and her sister said to each other at the time that it was Abraham; but neither of them stated, that he spoke to them and recognized them as his sisters, or that they spoke to him as their brother, or asked him any questions; and this sister, as well as the other, declared that she had no recollection of having told Abraham Hagerman's wife that they had seen him.

The object of this testimony was to establish the fact, that Abraham Hagerman was living in the winter of 1827, and if never heard of afterwards, could still not be presumed to be dead till the winter of 1834.

The defendants then proved, that a *fi. fa.* issued from the district court of the District of Newcastle against the lands of Abraham Hagerman, tested on the 29th of June, 1833, and returnable 1st of September, 1834, and was placed in the sheriff's hands on the 13th of July, 1833, indorsed to levy 51*l.* 8*s.* 11*d.* and interest from the 30th of March, 1833, sheriff's fees, &c.

The direction in the body of the writ was to levy 54*l.* 0*s.* 7*d.*, which the plaintiff, John D. Smith, had recovered against the defendant, as well for the non-performance of certain promises and undertakings, &c., as for his costs and charges.

It was proved by the sheriff, that he had received another writ against the lands of Abraham Hagerman in April, 1834, which cannot now be found; but that the land was sold upon the first *fi. fa.*, and a deed made by the sheriff to James Parratt Hagerman, on the 14th October, 1834.

In support of Smith's *fi. fa.*, on which the lands were sold, it was proved, that a writ of attachment issued from the district court on the 22nd of April, 1832, against Abraham Hagerman as an absconding debtor, under the statute 2nd Will. IV., ch. 5, (passed 28th January, 1832,) upon affidavits in the usual form, that the plaintiff believed that Abraham Hagerman had departed from this province or was concealed within the same, with intent to defraud deponent of his debt, or to avoid being arrested or served with process.

The two deponents who made the other affidavit which is required by the statute to accompany that of the plaintiff suing out the attachment, made oath, that they "believed the said Abraham Hagerman "departed from this province before the 26th day of January last, and "that he had ever since continued and then was absent from the same," and they swore to their belief of his intent, &c., as in the common form.

The affidavits were made on 21st March, 1832. The judgment roll was produced from the district court; it set out, that the defendant, Hagerman, had been summoned to answer; that he had appeared in person; that judgment had been obtained against him by *nil dicit*, and that damages had been assessed at 36*l.* 8*s.* over and above the plaintiff's costs and charges, and for those costs and charges to ————

The declaration was upon a note of hand for 9*l.* 18*s.*, and on the common counts; the damages were laid at 20*l.*

Deeds were admitted on the trial, by which the sheriff's vendee, James Parratt Hagerman, had conveyed to Strong the defendant the small portion of the land which he is in possession of, and to one Scott the other part of the land for a consideration of 1000*l.*

The plaintiff called witnesses in reply, for the purpose of contradicting the statement of the two sisters of Abraham Hagerman, that he had two moles or warts on his face, by which marks they swore they had

recognized him. His wife and others declared that he had not those marks.

At the close of the case it was objected by the plaintiff's counsel, that the *fi. fa.* on which the land was sold was void being for a sum over the jurisdiction of the court, without shewing how much was for damages and how much for costs.

2ndly, That the record shewed that the defendant, Hagerman, had been summoned, which was contrary to the mode of proceeding directed against an absconding debtor.

3rdly, That Hagerman having departed before the Absconding Debtors' Act was past he was not within the act, and all the proceedings against him were therefore void.

4thly, That on the face of the declaration the cause was not within the jurisdiction of the district court, and therefore the judgment was void.

The learned judge overruled the objections, telling the jury that the sheriff's sale would be valid unless the judgment or execution was on the face of it void, which he could not say was the case upon any ground; that if Abraham Hagerman was alive the sheriff's sale and the deed would be valid and pass the estate, otherwise not; that the legal presumption was that he was alive until seven years had elapsed from the time he was last heard of.

The jury were then desired to consider the evidence upon that point, and having done so they found their verdict for the defendants, thereby affirming the title under the judgment and execution.

It was also objected at the trial by the plaintiff's counsel, that after the lapse of so long a time the presumption of law is not strictly that the absent party died at the end of seven years and not before, but that it is to be left to the jury upon all the circumstances in evidence to assume that he died at any earlier period, or even immediately after the time when he was last heard of, in which case he would have been dead some years before the action at the suit of Smith was even commenced.

If the evidence of Hagerman's sisters was fully credited by the jury he must be recognized as living in January, 1827, and seven years from that time would bring it down to January, 1834, which would be after the delivery of the *fi. fa.* to the sheriff, but before the sale took place under it. There was no evidence respecting any act of seizing under the writ.

*A. Wilson* moved for a new trial on the law and evidence and for misdirection. In support of the last objection, on which he mainly relied, he cited 5 A. & Ad. 86; 2 M. & W. 893; 2 B. & Al. 386; 13 Ves. 362; 6 Ves. 606; 8 Jurist, 972, 1062; 1 M. & G. 1; 10 M. & W. 367; 7 A. & E. 726; 3 M. & S. 427; 7 M. & G. 529; Viner's Abr. Error, K. pl. 40.

*P. Vankoughnet* shewed cause; no cases cited.

The arguments of counsel fully appear in the judgment of the Chief Justice.

ROBINSON, C. J.—This case is one of that description, that whether the judgment be in favour of the plaintiff or the defendants, the losing party must be left to suffer great apparent hardship.

The defendants hold under assignments from a purchaser at sheriff's sale made many years ago, and it is not questioned that they were *bona*



*fide* purchasers for value, not responsible by having notice or otherwise for anything that may have been wrong in the proceedings. It was not the plaintiff in the execution who bid off the land at the sheriff's sale, in which case it might be surmised that he was a grasping creditor taking harsh and unreasonable measures in the absence of his debtor, with the design of getting into his hands a valuable property for a sum much below its value. It was a near relative of the debtor who bid off the land, and for all that appears he may have done so for the protection and benefit of the family, though it is not shewn that he did. The purchaser from him gave a large price for the farm, probably its fair value, another has acquired interest under him, and large improvements have, in the course of the many years that have since elapsed, been made on the premises.

If the defendants were now liable to be dispossessed by the heir-at-law of the debtor, unless for some extraordinary and quite conclusive reason, it would be inconsistent with the protection which the law throws around those who purchase openly and without fraud or collusion, what is sold under the process of the court. It would go far to shake confidence in the security of such sales, and that would be a consequence injurious alike to the interests of debtors and creditors.

On the other hand, there is in this case a great appearance of hardship upon the heir-at-law of the debtor, if the sale must be upheld. In the absence of his father, Abraham Hagerman, and some years indeed after he had left the province, an attachment was sued out against him as an absconding debtor, under an act passed four years after he had withdrawn from Canada which for the first time admitted any such proceeding; and upon a judgment for a small sum of money entered up in an inferior court of record, a farm then perhaps worth ten times as much as the debt, and now of much greater value independently of subsequent improvements, has been sold at a time when no one could act as his heir or as the representative of his estate or the guardian of his infant children, because he was not known to be dead, and could not be presumed to be so. Under such circumstances his estate, lying as it were helpless and subject to be acted upon by legal proceedings, with no one capable of watching or controlling them or of interfering to prevent the sacrifice by voluntary payment of the debt out of the resources of the estate, must be inevitably lost. There cannot fail in such a case to be a strong sympathy with the family of the debtor, but it would be unjust to forget, on the other hand, what consideration is due to the present holders of the estate, and to the large interests which they have at stake, acquired as they confessedly were honestly at least, and in such a manner as subjects them to no imputation of oppression or dishonourable conduct.

The heir of the debtor, having come of age, has brought this action in the hope of regaining the property; and he grounds his expectations, first, on certain objections to the legality of the proceedings anterior to the writ of *fi. fa.* on which the land was sold; secondly, on an alleged defect in the writ itself; and thirdly, on the position that the debtor ought upon the evidence to have been concluded to be dead at the time when the land was sold and conveyed by the sheriff, and even when the execution issued, which would prove the sale to be clearly illegal and void.

With respect to the first objection it is urged, that the debtor, having left the province long before the statute 2 Will. IV., ch. 5, was passed, could not be held to be an absconding debtor within its provisions; but so far as the mere fact of his being an absconding debtor is concerned, there is no ground of complaint in applying that term to him, for the evidence shews him to have been in the clearest sense of the words an absconding debtor; a person suddenly and clandestinely withdrawing from the province, for the purpose of depriving his creditors of the means of obtaining payment of his debts, by any proceeding which they could then adopt against him or his property. He went away in 1826 or 1827; the first Absconding Debtor's Act was passed 1832, under which an attachment was sued out against this debtor three months afterwards.

*Ex post facto* enactments are looked upon justly with jealousy even when their object is reasonable, where they are remedial rather than penal; and in regard to this act, it would seem harsh where a debtor had left the province under circumstances merely equivocal before this act was passed, to hold him subject to its provisions, and thus sanction proceedings against his property in his absence, which he may never hear of in time to prevent their final effect, and which he could not have contemplated as possible when he left the jurisdiction, because the law then existing would not admit of them.

Where it was clear, as in this case from the debtor's conduct and declarations, that he fled from the province in order to save his person and property from his creditors, and thus leave them without remedy, it is not to be regretted that such intentions should be frustrated; but there is at any rate no room for legal argument on the right of the creditor in this case to make the use which he did of the act, for the statute is express. Cases arose directly after its passing, in which the same thing was done, by applying the act retrospectively to the case of a person who had left this province before the act was passed. But the court could do no otherwise than sustain the proceeding, for the words of the act are, "that if any person or persons, being indebted to an inhabitant of this province, shall *before the passing of this act have secretly departed from this province*, or if any person so indebted shall after the "passing of this act secretly depart from this province, it shall be lawful, "&c. &c." The legislature without doubt intended the act to apply retrospectively, and we must give effect to their intention.

Then as to any alleged error or irregularity in the proceedings; it has not been made a question whether the lands were liable to be sold under an execution against lands from the district court, and it cannot be doubted. Sales are constantly taking place upon such executions, and what could be legally done in all other cases could of course be done in this, so far as any general principle is concerned.

The sale was made upon a writ on which there was little more than \$07. to be levied, but the sheriff had at the time another execution against the same defendant's lands which was equally entitled to be satisfied. The amount of both, one would suppose, might have been levied by exposing to sale a part only of the farm, and the same might be said with truth in many other such cases. But we are not to condemn the act of the officer unheard; there may have been reasons which when explained would be admitted to be sufficient. It may have been done at the

desire and upon an understanding with those who interested themselves on behalf of the debtor or his family in his absence, for in some cases it would not be thought expedient to divide the property; and at any rate the purchaser at the public sale, and still more those who have purchased again from him for a valuable consideration, are not to be disturbed at this distance of time, if they could be at any time, by holding the sale invalid on such a ground.

Then as to the objection taken to the *fi. fa.*; it directs 54*l.* 0*s.* 7*d.* to be made, which the plaintiff had recovered for damages and costs in an action of assumpsit. If the writ had stated that such sum or any sum above 40*l.* had been recovered for damages alone, then it would have been apparent on the face of the writ, that more damages had been recovered than the district court had jurisdiction to award. Before we could hold that that necessarily made the writ to all intents and purposes a void process, so that nothing done under it could be upheld, whether in an action against a purchaser or otherwise, we should have to consider what was held by the court in the anonymous case reported in Keilway, page 106, respecting judgments of courts of limited jurisdiction, in cases where the error is not in assuming jurisdiction over a subject matter of which they can take no cognizance, whether the amount involved be great or small, but where having a clear jurisdiction over the subject matter to a certain extent, the court has gone beyond that extent.

In the case referred to, a distinction is maintained between those classes of cases; but no such question can arise here, because we are not to defeat the title of a purchaser upon mere surmises that there *may* have been something wrong. The judgment may well have been for a sum within 40*l.*, exclusive of costs, the remainder consisting of costs only; it is not usual to state the amounts separately in the *fi. fa.* That goes for the whole sum adjudged after the "*ideo consideratum est*," and if the party desires to see whether the judgment has been regular or not, he must refer to the record, and in this case it will be found to be free from exception, the fact being that the debt was within the jurisdiction of the court, as appears on the record; all that can be said is, that the *fi. fa.* does not state all that the judgment does, which it is not necessary that it should in this respect, as we have already decided in other cases where a similar objection has been taken.

In respect to an objection taken, that on the record the defendant is stated to have been summoned, whereas the process in that case, to be issued under the 6th clause of the act, was not a summons any more than in others, but a mere bailable *capias*: this and all other objections are immaterial as regards a purchaser under the execution, for even if the judgment should be reversed for error appearing on the record, yet after the land had been sold under a writ valid on the face of it, the plaintiff could only be restored to the money made under the execution, not to the property which had been sold by command of the court. This was decided in a case reported in Dyer, 363, where many other authorities are cited.

Indeed, Mr. Wilson, who argued the case for his client very zealously and ably, though he made these objections, relied chiefly on the point made by him on the trial, that Abraham Hagerman, the debtor, was to be presumed to have died before the sale, if not before the execution issued, which would render the act of the sheriff void.



I take it to be clear that we have only to consider the question as to the time of the defendant's death, with reference to the period when the *fi. fa.* issued, or rather with reference to its teste; for if it were tested in his life time, it might be taken out and executed after his death; so that we are not to enquire whether the sheriff had done any act which could be called an inception of the execution while the defendant in the writ was living, nor whether he had even then received the writ, but whether on the 29th of June, 1833, when it bears teste, the defendant, Abraham Hagerman, was alive; or rather I should say, we are to consider what proof was given that he was then dead, for that is the question here, when the fact of his death is required to be shown by the person who asserts it, and relies upon it for the purpose of defeating the sale made under the writ, which unless on account of his death would be good.

If the fact were shown to be so, then I conclude that we could not do otherwise than to hold the execution void, and also the sale made under it, whatever might seem the hardship to the purchaser, for then the sheriff would have been selling the estate of one man under an authority to sell the estate of another, the change of property having taken place before the command was given. In *M'Carthy v. Low*, in this court, Hilary Term, 2 W. IV, (printed in the series of Old Reports, page 353) this point was so determined. In a case of *Harwood v. Phillips*, Sir Orlando Bridgman's Reports, 464, there is a very elaborate judgment of the Chief Justice himself, in the Common Pleas, upon the point, whether when the defendant died after the teste of a writ of *elegit*, and before the inquisition taken, the execution of the writ was good, which involved, he said, two questions: 1st, whether it might be legally executed after the death of the defendant; and 2ndly, if it might not, whether it was only voidable by error, or void in itself. The whole case is extremely well worth reading as a full and clear exposition of the points to be determined; his Lordship's conclusion is, "that the law is the same as to a writ of execution upon the lands, which bore teste *before* and comes to be executed after the death of the defendant, as it is upon goods, and that in both cases the writ executed after his death is good;" and upon the point whether in case the defendant should have died before the teste of the writ, all that has been done under it would be void, or only voidable, he says, "I conceive, taking it for granted that the execution was not well made in respect to the death of the defendant, it is then absolutely void, for the writ was abated in fact, and though it well excused the sheriff (not having notice of the death) yet it will not make the execution good." (Bridgman's Reports, 472.)

The writ in the present case was tested 29th June, 1833, and positive evidence was given that Hagerman, the defendant, was seen in Canada in the winter of 1827. How far this evidence could be relied on it was for the jury to judge, and it was carefully and expressly submitted to their consideration. No suspicion was thrown upon the evidence of the two witnesses who proved this, as regards their character or motives, or their means of knowledge, or from any inconsistency between their evidence and statements made by them at any other time. Whatever grounds there might be for apprehending they were in error, were, as we must suppose, fully discussed in presence of the jury.

But then the plaintiff's counsel maintains, that even accepting the evidence as sufficient to shew that Abraham Hagerman was living in the winter of 1827, and although from the mere fact that he was never afterwards heard of, his death could not be intended till seven full years had elapsed, which could not be before December, 1833, or January, 1834, six months at least after the teste of the writ, yet that now after the seven years have elapsed, and a much longer period, not less indeed than twenty, when it becomes necessary for any purposes to determine at what time he shall be considered to have died, there is no more reason for assuming that he died at the end of the seven years, than at the beginning, or at any point of time between the two. He contends therefore, that in this case the jury ought to have been instructed to find at what time he did in fact die, and might as well have found that he died in the first or second or any other year, as that he lived to the end of seven years, and that according to such finding it might have appeared that he was dead on the 29th of June, 1833, the teste of the writ, and so that the writ and all done under it was absolutely void.

Mr. Wilson supported this view at the trial and on the argument, by referring to the case of *Doe dem. Knight v. Nepean*, 5 B. & Ad. 86; 2 Nev. & M. 219: 2 M. & W. 893; and the decision and language of the courts in those judgments warranted him in laying great stress upon the authority, particularly as one of the judgments was upon error in the Exchequer Chamber.

The first doubt, however, is upon the application of that decision. If in the case before us it had been a necessary part of the defendant's proof, to shew that the defendant in the judgment was dead before the execution issued, or that he died before or after any particular day, then the case referred to would be in point; but the reverse is the fact; the defendant here had no occasion to shew that the defendant Abraham Hagerman was dead at any particular time; he would be willing, no doubt, to have it assumed that he is alive yet. It is for the plaintiff, who claims as his heir at law, to shew that he is dead, and that he died before the execution issued. Until he satisfies the jury of this, he cannot invalidate the title *primâ facie* good, which has been acquired under the execution.

In *Doe dem. Knight v. Nepean*, the lessor of the plaintiff, Paul Slade Knight, was entitled to a remainder in a copyhold estate after the death of his uncle Matthew Knight. He brought an action of ejectment in 1831, and it was necessary for him of course to prove the death of Matthew Knight, which was the commencement of his title.

In the first trial, which took place in 1832 before Mr. Justice Taunton, it was proved, that Matthew Knight went to America in 1807, and was never heard of after that year. Such is the statement of facts as reported in B. & Ad. In Nev. & M.'s account of it it is said, that he left England in 1797, and was not seen or heard of until the latter end of 1806, when he was seen by his family for a short period; that in May or June, 1807, a letter was received from him dated Charleston, since which no tidings of him had ever been received. In the statement of this case after the second trial, when it came before the court in error in the Exchequer Chamber, the report is, that in 1806 or 1807 Matthew Knight went to America, and in May, 1809, a letter was received from

him, but he was never heard of afterwards. If the case had been as stated in B. & Ad., that he went to America in 1807, and was never heard of after that year, then it might have been that the vessel in which he sailed was never heard of, and that would present such a question as frequently occurs in insurance cases, namely, where the ship would, with reference to the nature of the voyage, be called a missing ship. The natural conclusion would be that he had perished with her, and thus it is quite clear that his death might be assumed within whatever period might be reasonable under such circumstances; as in *Watson v. King*, *1 Starkie, N. P. C.*, and many other cases that might be cited. We have indeed had a case of that kind here, in which the captain of a schooner, which had disappeared from the lake, was assumed to have perished in her, and the right of his heir to inherit was recognized without waiting for the expiration of seven years as being indispensable to the presumption; but it seems that was not the case in *Knight v. Nepean*, as the other reports explain, for he did arrive in America and wrote a letter from thence in 1807, which was the last that was ever heard of him.

There had been an adverse possession of the estate by the defendant and those under whom he claimed for more than twenty years before the action brought. If the death of Matthew Knight was not presumed or found to have occurred before 1814, being seven years after he was last heard of, the plaintiff was in time with his action in 1831. Mr. Justice Taunton, who tried the cause, considered that he was in time, there being no ground for assuming that life had ceased at any time within the seven years, and the plaintiff therefore being driven to rely and entitled in consequence to rely on the legal presumption alone; and so I should have thought.

The defendant's counsel however was earnest in asserting, that although the death could not be presumed under the circumstances till the seven years had elapsed, yet that when they had expired and many years besides and still the party not heard of, the jury were no more to presume that he lived till the end of the seven years, than that he died at any time before, and the learned judge though he directed a nonsuit saved the point. The Court of King's Bench afterwards set aside the nonsuit, confirming the view taken by the defendant's counsel, and on the second trial before Mr. Justice Patterson, that learned judge, governed no doubt by the opinion of the court in granting a new trial, and probably fully concurring in it, directed the jury, "that it was incumbent "on the lessor of the plaintiff to prove that Matthew Knight was actually "alive within twenty years, and that he had not proved it." This was said with reference to the Statute of Limitations, because an adverse possession for more than twenty years was proved, and the plaintiff had to shew not only that Matthew Knight was dead but that he died within twenty years, and that his, the plaintiff's, action was therefore not barred.

The jury found that Matthew Knight was not proved to have been actually alive within twenty years next before the commencement of the action, which was merely carrying into effect the ruling of the judge, and seeming to establish a distinction between being alive and *actually* alive, in other words attaching no force to the legal presumption of life, where nothing has been shewn to the contrary. The learned judge however considered that the possession was not adverse, because the defendant



held under one George Knight, who was entitled to hold during the life of Matthew Knight his brother, and he considered that he or those claiming under him could not be looked upon as holding adversely, so long as it was uncertain whether Matthew Knight was alive or dead, that is, till the seven years had expired. In accordance with this ruling the jury found for the plaintiff on the second point.

Cross bills of exception were sealed at the trial, and after argument on Error in the Exchequer Chamber, the court held, that the direction on the first point was right, and confirmed the verdict which found in effect, that the lessor of the plaintiff might have entered in 1811, or as it would seem at any time after May, 1807, when Matthew Knight was last heard of, and therefore brought his action too late, and they held the direction as to the non-adverse possession wrong, and therefore that the lessor of the plaintiff was barred.

It is to be considered that Matthew Knight arrived in America, and wrote from thence in 1807, so that it was certain he was not lost on the voyage; it was not shewn that he was aged or in infirm health, or had gone on any expedition attended with danger, or that there was any circumstance whatsoever to affect the presumption that he continued to live for seven years after he was last heard of. The only ground for supposing him dead was the single circumstance that he had never been heard of, and if the statement of the case in 2 Nev. & M. 219, be correct, which is more circumstantial than that in B. & Ad., it is singular enough that in his case it was proved that the bare fact of not being heard of, was consistent enough with the supposition that he might nevertheless be alive for seven years after he had discontinued all communication with his friends, for it is there stated that he had left England before, (in 1797) and was not seen or heard of till 1806, which would be nine years. Then he went abroad in 1807, and because he was never afterwards heard of, the court thought it reasonable to hold that he must have died during that absence, in a much shorter period than seven years; for without having anything whatever but conjecture to guide them to such a conclusion, the jury were in effect told, that as he had not been proved to be actually alive, it was safer to conclude him dead, at any time they pleased after 1807; or at least so soon after as might serve to place the true owner of the estate in default for not entering in twenty years, and so make him lose his estate under the Statute of Limitations, because he had not availed himself in 1811 of a legal presumption, which did not apply till 1814, and upon which therefore he could not possibly have acted or attempted to act with any hope of success.

The decision certainly seems to go the whole length of establishing, that in any case whatever, where all that is known of a person is, that he has not been heard of for seven years, it is competent for the jury to assume that he died at any time within the seven years that they may choose to fix upon; for a discretion must be arbitrary that has nothing to guide it. And the court treat the legal presumption as no guide; it only establishes, they say, the fact of death, which must be assumed when the seven years are out, but affords no guide whatever as to the time of death. I see no reason why, if the parties in the present case were before the court under similar circumstances, the same principle,

or as it strikes me, rather the same absence of all principle, should not prevail.

With respect to Abraham Hagerman, it is proved that when he went away he was a young man in good health; he did not disappear mysteriously, so that it could be surmised that he might have been murdered, or fallen by some accident which concealed his body from view; he stated his intention not to return till he could pay all his debts, that is by the savings from his labour in a country where he was a stranger, a result which many people do not arrive at during a long life under more advantageous circumstances. His not writing may be partly accounted for from the consideration that he might not choose to give his creditors the opportunity of pursuing him. It depends so much on a man's habits, intelligence, thoughtfulness, natural affection, and other circumstances, whether he keeps up a communication with those absent from him, that it would be a rash conclusion to jump to that he must have died in a month, or in one, two, or three years, because no letter has been received from him. Still, though there could hardly be a case more bare of circumstances to interfere with the ordinary presumption of continuance of life, I cannot say that in that respect there is any distinction that could be relied upon between this case and that of *Knight v. Nepean*.

It happened that Lord Denman declared the opinion of the court on both occasions, that is upon the motion for a new trial in the King's Bench, and after the second trial upon error in the Exchequer Chamber. We may infer from this, that the judges were unanimous; except that Baron Vaughan, from an observation made during the argument, appears to have taken the other view of the question; but we lose the advantage of knowing by what arguments they severally came to that conclusion. Looking at the judgment and the reasons given in support of it, I have met with no decision to which I should have more difficulty in reconciling myself. It seems to me to make as decided a change in the law as could have been done by an act of parliament. It may perhaps be thought expedient at some time to give it that sanction; if not, I am persuaded it will on some future occasion be reversed. The arguments of the Attorney-General in favour of *Knight*, seem to me to be irresistible, and I cannot understand why they should not have prevailed.

Lord Denman supported his judgment by reference to insurance cases, such as *Watson v. King*; but in all that class of cases there is strong ground afforded by evidence for concluding that the death occurred from a certain known event, and therefore within a particular period. They only prove what no one could doubt, that the presumption of continuance of life for seven years is subject to be controlled by circumstances affecting the probabilities. *Webster v. Beardmore*, 13 Ves. 362, is a case of that description, where a person left England in bad health, intending to return in six months, and was never afterwards heard of; the master then considered that he still must conclude that he lived seven years, and reported accordingly; but the Chancellor overruled the report on exceptions, thereby only affirming that facts and circumstances might be material, and were to be weighed as bearing on the presumption, which is not inevitable.

His lordship referred also to the enactment in 19 Car. II., ch. 6, respecting estates determinable on lives, which lays down the rule, that where the person at whose death the estate is to cease has not been heard of for seven years, he shall then be considered to be dead, and the person next in succession may then commence his action, or may enter, &c.; but I do not see what argument that can afford in favour of any presumption that death occurred sooner.

It was not intended by the statute, no doubt, to shut out any presumption which evidence in the particular case might afford, that the person died sooner. The statute seems to apply directly to such a case as *Knight v. Nepean* so as to govern it; but all it provides is, that the death may be assumed at the end of seven years, when nothing is known on the subject, but not before as a mere presumption of law. It leaves any question of fact for the jury on particular evidence to be dealt with as before. His Lordship considered that the course taken on trials for bigamy, is almost conclusive on the question. There the first wife not having been heard of for seven years, is not taken as proof that she did not die sooner; but before the husband can be convicted of bigamy on a second marriage, there must be proof that she really was living when the second marriage took place. But that rests on a principle of universal application in the English Criminal Law, clearly exemplified in the very case cited of *Rex v. Inhabitants of Twining*, 2 B. & Ald., 386. The law always presumes a man innocent till he is found guilty; and there is presumption of innocence to set against the mere legal presumption of the continuance of life. The charge in such cases is, that the defendant feloniously married the second woman, his wife being then living; the whole offence rests on the fact charged of the first wife being alive, and it would be monstrous if that which constitutes the alleged felony should be inferred by a legal presumption which partakes of the nature of legal fictions, and is never applied to such purposes. It would be contrary to the whole spirit of the criminal law. I mean of the common law; for there are cases in which positive statutes do throw upon parties in certain cases the necessity of proving certain facts in order to establish their innocence. But I know of no instance in which the common law does so; it allows of certain legal presumptions which tend to the prisoner's acquittal, as that children below a certain age are incapable of committing certain offences; that a wife committing crime in the presence of her husband, acts under his compulsion; but it requires his guilt to be proved. The law does, to be sure, allow that from facts which are proved other facts may be assumed to have occurred which are not proved by an eye witness, but which seem irresistibly to follow as a natural inference from the proof given. This is of necessity, for neither life nor property would be safe, if it were adopted as a principle, that a jury can infer nothing to have happened which is not sworn to by some one who saw it; and besides, the deductions from circumstantial evidence are often more satisfactory than direct testimony, for obvious reasons. But if a court were to hold on a trial for bigamy, that the first wife must be presumed to be living for seven years from the last account that had been heard of her, resting upon the mere legal presumption, and without any evidence whatever, it would be a departure from the whole course of criminal justice. We have only to imagine



that the legislature had made bigamy punishable with death, to feel that a conviction on such ground could not be endured; and if not in a capital case, it would as little be admitted in any other, for the principle of just protection runs throughout.

In the judgment in *Knight v. Nepean*, the idea is advanced, that where a person has not been heard of for seven years, or for a longer time, the probability is greater that he died very soon after he was last heard of, than that he died at or near the end of the term. I dare say in the greater number of instances that might prove to be so, certainly not in all. It would depend very much on various circumstances, and when absolutely nothing is known, there can be no guide what point in the intervening period to fix upon.

At any rate, this consideration only serves to suggest that it might have been better to adopt this as a general principal, that when the seven years had elapsed the presumption should be, that the party had died on the day after he was last heard of, or at the end of a month or year, or some other time. Possibly that might have been in general more consistent with the actual fact; but the answer to any reasoning of this kind is, that there is no such principle of legal presumption, no authority, in the absence of all evidence to say that life ceased within the seven years. And it can never have been intended by the law, that the jury are to have an arbitrary discretion in the absence of all testimony, to fix upon any period that they like, and thus to overrule at their pleasure the legal presumption.

I think *Wilson et al. v. Hodges et al.*, 15 E. R. 312, shews clearly that the judges at that day were under that impression.

It may depend on the precise time of a man's death, whether an act done under his authority is valid or not; or whether an estate shall vest in one party or another; or whether a devise or a legacy shall have lapsed or not, and many other contingencies; and surely it is not to depend on the mere whim of a jury to adopt what day they please, without evidence or legal maxims to guide them, and thus to give the property to A. or to B. as they may choose. Where there is no evidence to affect the question, surely the presumption must come in.

If in this case, when Hagerman left the country, he had been indebted in 1000*l.*, to some creditor who had commenced his suit, and who had recovered judgment after his departure, and within a year or two took out execution and sold his land for its full value, is it possible that it can be held to be in the power of a jury ten years afterwards, in the absence of all evidence of the time of death, to give the estate to the heir-at-law, by assuming that the debtor died just before the execution was sued out?

If they could, another jury in another action respecting other property, might with as much propriety consider that he did not die till after the execution, and thus confirm the title of the purchaser.

There is no instance of our law resting on such a footing. Consider how it would operate where the widow of a person who had not been heard of for seven years, and of whom nothing particular was known, is suing for her dower in several actions relating to several estates, and claiming damages in all *a morte viri*. There would be no standard to which to refer the calculation, if the presumption of law establishes only

the fact of death, and is wholly irrelevant as to the time. One jury might give her damages for six years, another for two, and another for one, and all on the same evidence.

On the other hand, by taking the plain and intelligible course of directing the jury, that at the end of seven years in such cases the fact of death is presumed and not sooner, unless there is some evidence affecting the probability of life continuing so long, in which case they are to exercise their judgment upon that evidence, there is something like principle preserved. Under such a direction, no doubt, there would not be a uniformity of decision by different juries where the facts are special, but that is a common case and unavoidable. There would be a uniformity where there was no evidence to weigh, and as much ground to expect uniformity in dealing with the facts proved when there was evidence as there is in other cases. A diversity to some degree is unavoidable, but anything is more satisfactory and seemly than an absolute discretion without rule.

In the present case when the *fi. fa.* came to the sheriff, if as I think we must assume the seven years were not out, and he did not know the defendant to be dead, he was compelled to obey the writ, as the court remarks in their judgment in *Harwood v. Phillips*, which I have before cited from Sir O. Bridgman's Reports, p. 469. Then after he has proceeded to sell, as he was bound to do, and the estate has, under the authority of law, passed into the hands of a purchaser for valuable consideration, it would be inconsistent with every notion of justice to hold, that it shall be in the discretion of any jury, fifteen years afterwards, when nothing more is known of the death of the defendant than was known at the time of the sale, to pronounce without evidence of any kind to guide them that the defendant was dead, not only before the sale but before the writ was sued out; and that the command of the court was therefore void; and that the heir shall be placed in possession of the estate.

The language and decision of the court in *Knight v. Nepean*, would lead to this consequence, except for the consideration (which does not affect the question as to the presumption) that there the plaintiff had to prove the death of the absent person, and the time of it; first, in order to shew his own title; and next to relieve himself from the consequence of the adverse possession. The court held that he did not shew the time of it sufficiently for his purpose, though it seems to me that he did, when he shewed that the legal presumption applied to the case without evidence that could affect it.

Here, on the very principle of *Knight v. Nepean*, we must hold that the plaintiff was bound to shew when Hagerman died, in order to save himself from the effect of the sheriff's sale, and that he did not shew it. It appears to me, however, that he did shew it through the medium of the unrepelled legal presumption that life continued for seven years. Take it either way this verdict was right, if the jury believed that the defendant was seen in Canada in the winter of 1827. The direction was in my opinion proper, and we ought not to grant a new trial in such a case, on account of a supposed preponderance of evidence, where it was conflicting, since the verdict is not final.

JONES, J.—I think the rule should be discharged.

An objection raised against the title of the defendants is, that it is not

shewn that Hagerman, the ancestor of the lessor of the plaintiff, was alive when the *fi. fa.* against lands was placed in the sheriff's hands.

The jury have found that he was alive in 1827, since which period nothing has been heard of him. The presumption of law is, that at the expiration of seven years from the time he was last heard of he was dead. But the law raises no presumption as to the precise time of the death of a party; and the counsel for the defendant contended, that it was incumbent on the plaintiff to shew, that the defendant in the execution was alive when it was executed. Being alive in 1827, and there being no presumption of death till the expiration of seven years, it follows that till then he must be regarded as living, or at all events the onus is thrown upon the lessor of the plaintiff, whose claim rests upon his decease before that period, to shew the fact.

In Willson et al. v. Hodges et al., 2 E. 312, it was held, in accordance with the decision in Throgmorton v. Waller, 2 Rolle's Rep. 492, that where the issue was upon the life or death of a person once shewn to be living, the proof of the fact lies on the party who asserts the death; for the presumption is, that the party continues alive till the contrary be shewn. And this presumption continues till the expiration of seven years, when the presumption that the party is dead arises.—Doe Knight v. Nepean, 5 B. & Ad. 96; in Error, 2 M. & W. 893.

MACAULAY, J. and McLEAN, J. concurred.

*Per Cur.*—Rule discharged.

#### MILMINE V. HART.

A landlord agreed with his tenant, that if he should not paint the tavern outside, and the sheds and driving house, &c., in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint; the tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but *had not finished* painting any of the buildings on 12th July, 1845, when the landlord distrained for the quarter's rent due on the 1st July, 1845. *Held, per Cur.*—In an action of replevin, that under the terms of the lease, with respect to the painting, the landlord might distrain for the quarter's rent due on the 1st July, 1845, though the painting which had been *then begun but not completed* exceeded the quarter's rent for which the landlord had distrained.

Replevin. The plaintiff demised a tavern and other premises to the defendant, on the 20th of October, 1842, to hold from the 1st of January, 1843, for five years, at a rent of 31*l.* 5*s.* for the first year, and 37*l.* 10*s.* for the other four years, payable quarterly.

The lease contained a stipulation that the defendant should "paint the tavern outside, and the sheds and driving-house, by the 1st of January, 1844; and in case he should not do so, then Millmine (the plaintiff) to paint the said house and premises, and deduct the cost thereof from the amount of rent becoming due in the third year of the occupancy of the said premises.

The defendant did not do any of the painting by the 1st of January, 1844; the plaintiff was therefore at liberty to do all the painting, and to deduct it from the rent which would accrue for the year 1845. He did no painting, however, till June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any



of the buildings on the 12th of July, when the defendant distrained for the quarter's rent due on the 1st of July, 1845. The painting that had been done was proved to be worth about 15*l.*, which exceeded the quarter's rent for which the defendant distrained.

The plaintiff sued in replevin, and the defendant avowed under the distress for rent; and the plaintiff replied *rien en arrier*.

The question at the trial was, whether the tenant could under the stipulation in the lease claim credit for the value of the painting as done by him up to the time of the distress, as a payment of so much rent, or whether he was not unable to claim payment until the work was completed.

*J. W. Gwynne*, for the plaintiff, cited 2 T. R. 6; 9 B. & C. 92.

*Becher* of London, for the defendant, cited 2 N. R. 61.

ROBINSON, C. J.—In my opinion this case is undistinguishable from that of *Waddington v. Oliver*, 2 T. R. 6; and *Sinclair et al. v. Bowles*, 9 B. & C. 92; and from other cases in which the courts have held contracts to do work, or to deliver goods, to be entire; and that the party doing the work, or delivering the goods, has no right of action, unless under peculiar circumstances, until he has performed what he has undertaken. If *Millmine* had engaged as a tradesman to paint the tavern, sheds and driving-house, for *Hart*, he could not have claimed payment for any thing till he had finished the whole. He could not have painted part of one of the buildings and then sued for compensation *pro tanto*, unless indeed the other party had rescinded the agreement on his part by preventing him from completing the work. So also if *Hart* had been suing *Millmine* for a debt in the common form, *Millmine* could not have claimed a set-off on account of the value of this partly executed job of painting, because there could be no debt due till it was finished. To hold otherwise would occasion much inconvenience and injustice. Then how can we apply a different principle here? There can be no set-off to a claim for rent; nor could the work done upon the premises demised have been set up as payment of the rent, if it were not for the express agreement to that effect in the lease. Then, as the tenant can only claim under that stipulation, he must bring himself within the terms of it. He must, as the lease says, "*paint the house and premises, and deduct the cost thereof*" (that is the cost of the whole job) from the last year's rent; but he has not painted the house and premises, but only a part of the house and none of the other premises, and yet seeks to deduct from the rent the cost of doing that part of the work only. Where could we draw the line in such cases? We could not do it according to our idea of what might seem reasonable and convenient, considering the proportion of work done in each particular case, or the nature of the job. We have no such discretion.

If this plaintiff can claim payment for one side and two ends of a house painted, he would have the same right to claim when he had painted the half of one end or before he had finished a fraction of the building, and as well when he had earned 2*l.* or 5*l.* as when he had earned 15*l.* It would deprive the landlord of the opportunity of objecting to the work when finished on account of the manner of its execution, if he must thus pay for it piecemeal, and before he could know whether the tenant would finish it or not, or in what manner he would finish it. It seems harsh in

the landlord certainly, to distrain for his rent while the tenant was going on with the painting, and after he had done work to a greater amount than the quarter's rent, but he could not tell whether the tenant would go on and complete the job in a workmanlike manner; and if the tenant sustains inconvenience by being distrained upon in the meantime, he owes it to his own delay in using his privilege to pay the rent in that manner. The meaning was clear, that if the landlord did not paint the house, &c., in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. Instead of this, he only begins in the middle of 1845 to do the painting, and fails to place himself within the terms of the agreement in time to prevent his being called upon to pay the money. According to what the plaintiff contends for, the landlord must wait till the whole year 1845 had expired, as he could not tell but that the tenant might choose to do the painting or some of it at the last moment, and the rent would be virtually suspended throughout that year. In my opinion the verdict for the defendant was proper.

MACAULAY, J., JONES, J., McLEAN, J. and DRAPER, J., concurred.  
*Per Cur.*—Rule discharged.

---

THOMAS V. HILMER.

Where the district court makes an order or pronounces a judgment from which either party can appeal under the 57th clause of the 8th Vic., ch. 13—that is the method of appeal the party must follow, and not by writ of error.

Where a verdict has been given for the plaintiff in the district court for a sum beyond its jurisdiction, the plaintiff may cure the defect by entering on the record a remittitur for all damages beyond the jurisdiction.

In this case the defendant contended that he could bring error upon a judgment in the district court, notwithstanding the statute 8 Vic., ch. 13, sec. 57, provided for all orders, decisions and judgments of the district courts being examinable by this court, upon appeal to be brought before it as that act directs. He relied upon the right to bring error not being taken away by express words, and on our statute 5 Will. IV., ch. 2, which latter act has no particular reference to district courts, and makes no mention of them, but is passed "for facilitating the correction of errors in the judgments of inferior courts of record." If this is an inferior court of record to which writ of error can now go, notwithstanding the statute 8 Vic., ch. 13, sec. 57, then the statute 5 Will. IV., will apply, otherwise not.

The plaintiff in error referred to Foster's case, 11 Co. 63, and to Rex v. Justices of Worcestershire, 5 M. & Sel. 457.

ROBINSON, C J., delivered the judgment of the court.

These and other authorities support what is not disputed, that where a writ of error lies it is *ex debito justitiæ*, and no doubt it is a general principle, that whenever an inferior court of record is constituted by act of parliament to proceed according to the common law, its judgments are of right examinable by the Court of King's Bench; but neither those cases nor I believe any other that can be cited support the position, that when the statute which creates such inferior court expressly makes its judgments examinable in the King's Bench by a particular mode of proceeding in appeal, provided for in the act, and intended to secure to the suitors

cheapness and expedition, there is yet a common law right in the suitors to have its judgments in all cases brought before the same court by another mode of proceeding, namely, by writ of error.

It is our opinion at present, that whenever the district court makes an order, or really pronounces a judgment from which either party can appeal under the 57th clause of the 8 Vic., ch. 13, it is the method of appeal pointed out in the act that must be followed, and not the less summary and more expensive proceeding by writ of error, for which that was clearly intended by the legislature to be substituted.

Where the complaint is confined to the record, and is not against the judgment actually given by the court, which it is insisted is the case here, then I assume that error must be as before the statute, or there might be found to be no remedy.

We see no ground, however, for revising the judgment in this case; as the plaintiff laid his action, it was clearly within the jurisdiction of the court, and the judgment to recover 20*l.* damages for tort to a personal chattel, is as clearly free from any error. All that can be said is, that in an intermediate stage of the proceedings something was done which it was illegal to do. The jury, not aware, perhaps, to what sum the jurisdiction was confined, gave a verdict for 25*l.* damages, which the defendant in the action maintains at once and inevitably ousted the court of its jurisdiction.

We have lately held in the case of *Jordan v. Marr*, that this is not the necessary effect of such a verdict; but that it may be cured, as it was in this case, by remitting the damages beyond 20*l.*

It would be hard indeed, if where a plaintiff only estimated his damages at a sum within the jurisdiction of the court, he should be turned out of court by the circumstance of the jury being willing to give him more than he asked for. If he had sued in the court and laid his damages at 25*l.*, the jury might very possibly have considered the chattels worth no more than 20*l.*, and then he would have lost his costs. Determined to be safe, he makes a moderate estimate of his damages, and then, according to what is contended for, if the jury should happen to give a verdict for a few shillings more, he must be turned out of court by their verdict.

I think the entry of *remittitur damna* was proper, and clearly the judgment is right.

If the defendant considered that the plaintiff acted illegally or irregularly in remitting the damages, he should have moved the court below, and from any judgment upon his motion he might have appealed.

*Per Cur.*—Judgment below affirmed with costs.

---

#### ERRATUM.

In the digest to the case of *Foote v. Bullock*, page 480, for "the bond" "is not void" read "the bond is void," the word "not" being inadvertently inserted.



# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN THE

### QUEEN'S BENCH AND PRACTICE COURTS,

FROM HILARY TERM, 10 VICTORIA, TO  
MICHAELMAS TERM, 11 VICTORIA.

---

#### ABATEMENT.

*Non-joinder.*] A. sues B. alone in assumpsit, B. pleads in abatement, that he made the promises jointly with C. and D., that C. is resident within the jurisdiction of the court, and D. without. *Held*, on demurrer to plea in stating D. to be residing out of the jurisdiction of the court, that the plea was good.

On a joint contract by three all must be sued, if within the jurisdiction of the court; if one is without the jurisdiction the other two must be sued. One alone cannot be sued, if there are two remaining within the jurisdiction, because all three cannot be sued.—*Corbett v. Calvin*, 123.

#### ABSCONDING DEBTOR.

*Action against, proof of identity of plaintiff and payee of note.*] In an undefended action against an absconding debtor (the maker of a note), the plaintiffs (*Appleton, Paige and Appleton*) proved the handwriting of the defendant, but could not shew that *James W. Paige & Co.*, the parties to whom the note was made payable, were the three plaintiffs in the suit. A verdict was taken sub-

ject to the opinion of the court as to this point. A rule to enter judgment was taken out in term, and served by affixing a copy in the crown office, and leaving another at the defendant's last place of abode in this province, with a grown-up person there. *Held, per Cur.*, that in the absence of any cause shewn by the defendant, the debt was sufficiently proved to satisfy the 7th section of the *Absconding Debtor's Act*, 2 Will. IV., ch. 5.—*Appleton et al. v. Dwyer*, 247.

The *Absconding Debtor's Act*, 2 Will. IV., ch. 5, is retrospective in its operation, with respect to persons leaving the province before the act was past.—*Doe Hagerman v. Strong et al.*, 510.

#### ACCOUNT.

*Method of calculating Interest.*] The method usually adopted in making out an account between debtor and creditor upon a loan of money, viz., that of charging, first the interest upon the whole for the whole period as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest,

is not the correct way of arriving at the balance. It is so much in favour of the *debtor*, that where there has been a long arrear of interest, and payments made on account by the debtor not covering the interest alone, the debtor in a few years, without adding any payment in the meantime, will make *his creditor his debtor* to a very large amount.—Sir James McGregor et al., *Executors, v. Gaulin et al.*, 378.

### ADMISSIONS.

*Letters.*] Letters written by the parties to a suit, like receipts and other admissions, are always open to explanation, unless, under the particular circumstances of the case, they may have led to conduct in third parties involving loss to them, by reason of their having acted upon the faith of such letters.—Cuvillier et al. v. Brown, 105.

*Agent.*] A., defendant's attorney, accepting his instructions from B., as the agent of the defendant, and making his defence under them, is bound at the trial by the admissions B. has agreed to make.—Doe dem. McDonald v. Long, 146.

### ADVOCATE.

*Witness.*] Where a counsel, upon stating to the jury the facts he himself could prove, is reminded by the judge that he cannot act both as an advocate and a witness, and then immediately sits down, ceases to act as counsel and gives evidence in the cause, the court will not enforce their recent rule so rigidly as to set aside the verdict.—Cameron, administrator, &c., v. Forsyth et al., 189.

### ARBITRATION.

*Power of Arbitrators. Form of Submission. Legal Intendment.*] Where the submission, with respect to some of the points to be settled, expressly states, that the *majority* of the arbi-

trators shall have power to make an award, it will be intended by the court, that this power, though not repeated throughout the submission, extends to all the matters in reference upon which the arbitrators cannot agree.—Thirkell v. Strachan, 136.

*Excess of Submission.*] Where arbitrators, being authorised to do so, dissolve a partnership, and in order to adjust the terms of the dissolution award upon disputes that have arisen with respect to the partnership subsequent to the date of the submission. *Held*, that the award did not on that ground exceed the submission.

Arbitrators may direct promissory notes to be given for the sum awarded.—Thirkell v. Strachan, 136.

### ARREST.

*Agreement not to arrest.*] Where a debtor leaves the province, and returns upon an agreement that he is not to be arrested, provided that he immediately proceeds to the settlement of his estate, and the creditors upon his return arrest him, alleging that he has broken the condition upon which he was not to be arrested, and the debtor applies to the court to set aside the arrest, the court will not discharge him from the arrest, but will leave him to his action on the agreement.—Sutherland v. Murphy, 176.

### ASSIGNMENT.

*After fi. fa. against Goods returned.*] An assignment of goods made by a debtor after a writ of *fi. fa.* has been returned *nulla bona*, and after the *return day has passed*, is valid.—Pollock et al. v. Fraser, Sheriff, 523.

### ASSUMPSIT.

*Money had and received.*] A. leaves with B. the following receipt: "Mr. John L'Esperance has left with me a note signed by J. G. Tremain for 97*l.* payable at the Bank of

"Montreal here, at three months from the 31st ultimo, which I am to account to him for *if paid*, deducting the amount he owes me. Cobourg, April 1, 1846. (Signed) "Benjamin Clark." A. endorses the note and gets it discounted at a bank. When it becomes due the note is renewed with B.'s assent, who endorses the same. Before the renewal becomes due, B. sues A. for money had and received. *Held*, that under these facts the action would not lie.—*L'Esperance v. Clark*, 12.

*Forwarder, deviation from Instructions.*] It is no defence for a forwarder deviating from his instructions, that after the deviation he told the plaintiff's agent he had done so, and no objection was made by the agent. *Aliter*, if he had told the agent of his intention before the deviation, and could shew that the agent had any discretion in the matter.—*Fowler v. Hooker et al.*, 18.

*Special Agreement. Implied Assumpsit.*] A. contracts by deed with B. to cut for him certain lumber. A., being in default under his special agreement, and supposing C. to have a joint interest in the lumber with B., sues B. and C. on an implied assumpsit. *Held*, that though A. might sue B. alone on the implied assumpsit, yet that being concluded by the deed as to the parties liable on the contract he could not sue B. and C. jointly.—*Armstrong v. Anderson et al.*, 113.

*Misjoinder. Nonsuit. Verdict.*] In joint actions of assumpsit a misjoinder of the defendant's cannot be cured, either by a *nolle prosequi* or by a nonsuit as to some of the defendants; a nonsuit as to some is a nonsuit as to all, and a verdict returned for some of the defendants is null and void.—*The Commercial Bank v. Hughes et al.*, 167.

*Money paid.*] A. releases B. from gaol, by undertaking to pay C. the

debt B. owed him; C. sues A. upon this undertaking and recovers, B. requests A. to defend the suit in order to gain time. *Held*, that A. could recover from B. the costs of this suit on the common count for money paid to his use.—*Smith v. Davidson*, 191.

*Money paid.*] A., a wharfinger and warehouseman, receives a hogshead of sugar to be stored in his warehouse; it belonged to B., but through mistake it was delivered by A.'s servant to C., who came and claimed it as his; B. hearing of it convinces A. that he has made a mistake in delivering it to C., and A. pays B. the price of the sugar and brings his action on the common count for money paid against C.; A. recovers. *Held, per Cur.*, on motion for a new trial, that A. on these facts need not declare specially, but could recover against C. on the common count for money paid.—*Kitson v. Short*, 220.

*Continuing Debt. Good consideration.*] A special assumpsit to pay in grain, or in any particular manner, or at a future time a *continuing debt*, in respect to which the law had raised an implied assumpsit to pay in money on request, is a binding promise supported by a good consideration.—*Belcher v. Cook*, 401.

*Extra Work. Contract.*] *Quære*, as to what is *extra work* under a contract, and *what extra work* beside a contract.—*Ritchey v. The Bank of Montreal*, 459.

*Services rendered for Relative.*] Where services are performed for a relative or other person upon a mere reliance that the party serving will share in his bounty under his will, such services do not afford the ground of an action as upon an implied assumpsit to pay in money.—*Whyatt v. Marsh*, 485.

*Principal and Agent.*] *Semble*: that a principal, for whose benefit a contract was made by his agent, may



sue the defendant in his (the principal's) own name, though the defendant may have known nothing of the principal's interest in the subject matter of the contract at the time.—*Mair v. Holton*, 505.

### ATTORNEY.

An attorney cannot act at the trial of a cause both as an advocate and a witness.—*Benedict v. Boulton et al.* 96.

*Demand of Plea.*] An attorney, under the 10th rule of Easter Term, 5 Vic., must still be served with a demand of plea *in term time*.—*Gibb v. Miller*, 113.

*Power to substitute.*] Where money by an award is to be paid to the plaintiff or his attorney, the attorney cannot substitute another attorney under him to receive the money.—*Masecar v. Chambers et al.*, 171.

*Duty of. Delivery of brief to Counsel. Negligence.*] A. retains B., an attorney living in Kingston, to defend him in a suit to be tried at the Perth assizes. Before the trial A. comes to Kingston to advise with B.; B. tells A. that having no other cases in Perth he cannot go there in this one suit, but that C., who is a barrister residing in Perth, would attend to it, and that B. had better see him on the subject. A makes no objection, but returns to Perth and instructs C. in his defence. C. conducts the suit at the trial; a nominal verdict is given against A. No complaint is made that C. mismanaged the case in any way. *Held*, that under these circumstances B. is not liable to an action for negligence at the suit of A., in not himself making up a brief and delivering it to C.—*Macaulay, J., dissentiente*.—*Kenny v. Armstrong*, 196.

*Evidence by.*] An attorney is an admissible witness to prove by whom he was employed to sue out a bailable writ.—*Beamer v. Darling*, 249.

*Proceedings against. Service of demand of Plea.*] Where a plaintiff serves a defendant, an attorney, with a demand of plea *in vacation*, and signs judgment and serves his notice of assessment, if the defendant applies within a reasonable time after judgment has been signed to set aside the judgment for irregularity he will succeed.—*Moffatt v. McMartin*, 256.

*Account rendered by, not binding on client.*] The rendering an account by the plaintiff's attorney in this province, (the plaintiff residing abroad) is not binding finally on the plaintiff as to the mode of calculation, and even where the plaintiffs themselves in the first instance incorrectly state an account, they may have it legally adjusted at any time before a final settlement.—*Sir James McGregor et al., Executors, v. Gaulin et al.*, 378.

*Right to be heard as an Advocate in District Courts.*] *Per Macaulay, J., and Jones, J.* Attornies of this court, not being barristers, cannot as of right be heard as advocates in the district courts of this province. *Robinson, C. J., dissentiente*.

The court thus differing in opinion, as to the right of attornies to practise as advocates in the district courts, refused a mandamus to a judge of one of the district courts to admit an attorney to be heard therein as an advocate.

N.B. The result of this decision seems to be, to leave it *discretionary* with the district judge, either to grant or refuse to attornies the privilege of practising as advocates in his court. *Mandamus in re Lapenotiere*, 492.

### AWARD.

*Joint submission.*] Where several parties make a joint submission of their claims the award is final, though it does not distinguish the portion of money each party is to receive.—*McGill v. Proudfoot*, 40.

*Interest.*] When an award fixes no day for the payment of money, a party suing for the sum awarded is not as a matter of right entitled to *interest*.—Bentley v. West, 98.

*Variance.*] A variance in the names of arbitrators, as stated in the declaration, the agreement and award, is no ground for a nonsuit.—Bentley v. West, 98.

*Motion against Verdict.*] Where a party obtains a verdict on an award, the court, upon a motion against the verdict, will not go into the merits of the award.—Thirkell v. Strachan, 136.

*Excess of Submission.*] Where arbitrators, being authorised to do so, dissolve a partnership, and in order to adjust the terms of the dissolution, award upon disputes that have arisen with respect to the partnership subsequent to the date of submission: *Held*, that the award did not on that ground exceed the submission.

Arbitrators may direct promissory notes to be given for the sum awarded.—Thirkell v. Strachan, 136.

*Real Property. Ejectment.*] An award made upon a question respecting real property *expressly referred* is binding upon the parties, so far as respects the right of either to bring an ejectment against the other, or to defend himself against an ejectment.—Doe dem. McDonald v. Long, 146.

*Enlargement of Time for making. Rule of Court.*] Where the time for making an award is enlarged, the enlargement as well as the original submission must be made a rule of court.—Masecar v. Chambers et al., 171.

*Affidavit of Execution.*] The affidavit proving an award must shew that it was executed within the time limited by the submission.—Heathers v. Wardman, 173.

*Uncertainty. Not disposing of Verdict, &c.*] Where it is the inten-

tion of the parties by the submission of reference to settle all matters finally between them, and for that purpose they give the arbitrators power to award upon the conveyances to be made between them, the amount of rent to be paid and the security to be taken therefore: *Held, per Cur.*, that an award directing "*all necessary*" deeds for granting, &c., and for securing payment of the rent to be "executed," without saying what kind of conveyances, &c., is bad.

Where also a verdict is taken for 1s. in a suit subject to an award, and the arbitrators do not in their award in any manner dispose of the verdict or suit: *Held*, award not final and bad.—Beatty v. McIntosh et al., 259.—See also power of arbitrators to make certain awards.—Everett v. Whiteford, 261.

## BAIL.

*Sci. Fa.*] Where judgment and execution have been obtained against bail by returns of *nihil* to *sci. fa.*'s, without any knowledge on their part of the proceedings against them until a levy is made by the sheriff, the court, though they cannot set aside the proceedings, will interpose and let them into a defence to the action, upon payment of costs.—Read v. Hilts et al., 175.

*Ca. Sa. Sheriff's duty. Arrest on. Discharge of Bail.*] Where a sheriff is requested to return *non est inventus*, he need not seek the debtor; but if he does and arrests him the bail are discharged, and if the debtor escapes, no matter from what cause, the liability of bail does not revive.—Read v. Hilts et al., 175.

*Fraudulent render.*] A debtor on bail to the limits comes to the sheriff's office, and tells the clerk there that he wishes to surrender himself. The clerk tells him to remain in the office till he finds the sheriff or his deputy. He goes out and leaves

the debtor in the office, but before he finds the sheriff and returns to the office the debtor absconds. *Held*, in an action brought by the assignees of the sheriff against the bail, that this being a mere pretended and fraudulent tender, it could not fix the sheriff.—Kennedy et al. v. Brodie, 189.

### BAILIFF.

*Notice of Action.*] The statement of a bailiff, that "he believed the "cattle to be the plaintiff's," when he seized them in execution against the person in whose possession they were, does not divest him of the character of bailiff, so as to make it unnecessary to serve him with notice of action.—Sanderson v. Coleman, 119.

### BANKRUPTCY.

*Assignment of Property.*] An assignment of property, made *bonâ fide* by a person about to become a bankrupt to one of his creditors thirty days before the commission of bankruptcy issued, is good if it be made without the knowledge on the part of the creditor of any act of bankruptcy having been committed, or that bankruptcy was in contemplation.—Armour, assignee of Boyd, a bankrupt, v. Phillips, 152.

*Action by Bankrupt.*] Where a plaintiff commences an action, and pending the proceedings becomes a bankrupt, he may, under our Bankrupt Act, 7 Vic., ch. 10, sects. 31 & 32, continue the suit in his own name, unless the assignees intervene and desire to be made plaintiffs in his stead.—Ireland v. Wagstaff et al. 231.

### BOND.

*Husband and Wife.*] A bond of submission to an arbitration, signed by the wife as well as the husband, is a valid bond.—McGill v. Proudfoot, 40.

*Arbitration. Omission of parties interested.*] A. is substantially inte-

rested in a lease; B. becomes security for A.'s performance of covenants. D. and A. refer disputes connected with the lease to arbitration. *Held*, that it is no objection on the part of D. to the bond of submission, that B. is not a party thereto.—McGill v. Proudfoot, 40.

*Indemnity Bond to Sheriff.*] Upon an indemnity bond to the sheriff, the obligors must save the sheriff harmless, by taking the defence of any action against him upon themselves, and judgment against the sheriff is conclusive against the obligors.

Notice to the obligors by the sheriff of his being sued is not necessary to give him a right of action against them.—Thomas, sheriff, v. Johnston et al., 110.

*To convey real Estate. Duty of Obligor.*] Where an obligor binds himself within a certain time to convey an estate to the obligee, he must himself prepare the conveyance and tender it executed to the obligee.—Mouck v. Stuart, 203.

Where an obligor binds himself "well and truly to convey the land," he must himself tender the conveyance executed to the obligee.—Prindle v. McCann et al., 228.

### COGNOVIT.

*Judgment on old.*] The court will order judgment to be entered upon a cognovit seven years old, upon an affidavit from the plaintiff stating, that having received a letter from the defendant he believes him to be still alive, though the affidavit does not state that the defendant wrote or signed the letter.—Oliphant v. McGinn, 170.

### COMMISSION TO EXAMINE WITNESSES.

*Due execution of.*] Where the due taking of evidence given abroad under a commission is sworn to by A. before B., who certifies at the foot of



the affidavit, that he is "police judge" of a certain town in the State of Kentucky; that A. is a person well known to him, and that he deposed before him to the truth of the matters stated above; and who signs the certificate with a scroll O in the place of a seal, adding that he has no corporate seal. *Held, per Cur.*, upon an objection to the commission, that it could not be read, because the affidavit of due execution was not subscribed by the *deponent*, and because there was no proof of the authority of the person who administered the oath, and no seal attached to his name—that the commission was duly executed and might be read.—*Passmore v. Harris*, 344.

### COMMON SCHOOLS.

*Powers of Superintendent.*] A township superintendent of common schools, appointed under the act 7 Vic., ch. 29, since repealed by the act 9 Vic., ch. 20, sec. 45, has no legal authority to sue the collector of the township for monies received by him, not in the nature of penalties.—*Shirley, Superintendent of Common Schools, v. Hope*, 240.

### CONTRACT.

*Extra Work, &c.*] *Quære*, as to what is *extra work* under a contract, and *extra work* beside a contract.—*Ritchey v. The Bank of Montreal*, 459.

*Principal and Agent.*] *Semble*: that a principal, for whose benefit a contract was made by his agent, may sue the defendant in his (the principal's) own name, though the defendant may have known nothing of the principal's interest in the subject matter of the contract at the time.—*Mair v. Holton*, 505.

### COSTS.

*Issues in Law and Fact. Judgment on Demurrer and Verdict.*] The

defendant demurs to one of the counts in a declaration, and takes issue on the others. The plaintiff goes to trial, and assesses contingent damages on the demurrer for one farthing. The plaintiff succeeds on the demurrer, and the defendant has a verdict upon all the issues. *Held*, that the defendant is entitled to his costs of the issues in fact, and may have judgment and execution for them.—*Taylor v. Carr*, 149.

*Corporation.*] The plaintiffs sue a corporation in debt, and recover only 5*l*. The plaintiffs move the court in banc to be allowed Queen's Bench costs, upon the ground that it was impossible for them to proceed against the defendants in the district court, by reason of their being a corporation. The court ordered Queen's Bench costs in this suit to be taxed for the plaintiffs, as it was the first in which such a question had been raised; but they intimated an opinion, that a corporation could be sued in the district court, and that upon the point again coming before the court they would grant a rule nisi and have the matter formally discussed.—*Fisher et al. v. The City of Kingston*, 213.

### COVENANT.

*Must be express.*] The covenant in a deed upon which a party sues must be express and distinct, and not gathered as arising consequentially or morally by reason of something else contained in the deed.—*Liddell v. Monro*, 474.

### CRIMINAL CONVICTION.

*Informal conviction.*] The following conviction before magistrates, "for that the defendant did at, &c., on "or about the 1st day of December, "and upon other days and times before and since, take and receive toll "from the informant at toll-gate No. "3, situate on the macadamized road "between Hamilton and Brantford

"in said district, unlawfully and improperly, the said gate not being in a situation or locality authorised by law," being moved into this court by *certiorari* was held bad, in not shewing that the defendant was summoned or was heard; and in not setting out the evidence, or stating that any complaint was made or evidence given by any one on oath; in not stating how much toll was taken, and in not shewing in what respect the taking of toll was unlawful.—*The Queen v. Brown*, 147.

### DEDICATION OF LAND FOR A ROAD.

*Subsequent conveyance void.*] Where A. has expressly dedicated by deed certain lands for the purposes of a public road, and the public have adopted such dedication by user, A.'s subsequent conveyance of the land to B. cannot control the prior dedication.—*Malloch v. Anderson*, 481.

### DISTRESS.

*Vessels attached to a wharf.*] Where a wharf has been leased, "with all the privileges thereto belonging," a vessel attached to the wharf with the usual fastenings, cannot be distrained upon for rent.—*Sanderson & Murray v. the Kingston Marine Railway Company*, 340.

*Stranger to Lease.*] A. demises to B. for a certain term. B. during the term absconds and abandons the property; C. finding the place vacant puts a person in possession and makes a demise to D. A. distrains for rent under his lease to B. *Held, per Cur.*, distress legal.—*Rudolph v. Bernard*, 238.

### DISTRICT COUNCILLOR.

*Town Clerk, ex-officio presiding officer at election of.*] At a township meeting for the election of township officers, the first duty of the meeting is to elect a district councillor, and

the town clerk ex-officio may preside as chairman of the meeting, until such councillor be chosen. The court therefore refused, upon an information in the nature of a *quo warranto*, to disturb the seat of a district councillor who had been elected by the meeting, though under protest at the time by some of the electors, because the town clerk had insisted upon acting ex-officio as chairman.—*Small, Coroner, &c., on relation of Walker v. Biggar*, 497.

### DISTRICT COUNCILS.

*Right to sue each other.*] One district council may sue another district council for a cause of action connected with their public duties; and the balance of district revenue which one district withholds from another, affords legal ground for such an action.

A district council cannot be sued upon the common money count, upon the account stated, unless at least the subject matter of the account be averred, and it is seen to be such as can by law create a debt from the defendants to the plaintiffs, to be satisfied out of the funds of the district.

*Semble*: that it was not necessary, before action, to give a notice to the treasurer of the London District, of the claim of the plaintiff against the district.

*Semble also*: that it was necessary, in order to a right to action, to aver a request from the plaintiff to the defendant to pay over the money due.

*Semble also*: that in suing for a debt due by the district, under the 43rd clause of the 4 & 5 Vic. ch. 10, it should be averred that the defendants have funds to pay the debt, after discharging the demands to which the 59th clause gives a preference.—*Huron District Council v. London District Council*, 302.

*Treasurer. Mandamus.*] At a session in October, 1846, A. was elect-

ed, by the district council of the Midland District, treasurer of the district. When elected, A. was *himself a district councillor*. B., at the time of A.'s election, was holding the same office of treasurer to the district, having been long previously appointed to that office by royal commission. A., upon his election, requested B. to give him the books, &c., of office. B. refused, upon the grounds that, under the District Council Acts, 4 & 5 Vic. ch. 10, and 9 Vic. ch. 40, A. had been elected treasurer at a time and session when by law no such election could take place; and that the two offices of district councillor and treasurer were incompatible. Upon B.'s refusal, A. applied to the court for a mandamus to B., to deliver the books, &c.

*Held, per Cur.* 1st. That A. had been elected at the proper time and session. 2ndly. That the two offices were incompatible. 3rdly. That A. was ineligible for election, the council having no power to receive his resignation as councillor. 4thly. That notwithstanding A.'s irregular election, he, as the treasurer *de facto*, under the act 9 Vic. ch. 40, had a legal right to the books, &c., of his office; and that a mandamus might go to B. for the delivery of the books, &c., to A., he being, since A.'s election under the act, a mere stranger to the office.—*The Queen v. David John Smith, treasurer of the Midland District*, 322.

*Clerk, power to charge council.*] The clerk of a district council can only charge the council by such acts as are within the scope of his general authority, or by such as they either directed before hand, or sanctioned afterwards, either expressly or by availing themselves of, to their advantage.

The district council have no power to authorise their clerk or agent to make any contract for the purchase

of books for the several common schools throughout the district, such a contract "not being necessary for the exercise of their corporate functions."—*Ramsay et al. v. The Western District Council*, 374.

### EJECTMENT.

*Judgment against casual ejector, by collusion of tenant.*] When the tenant in possession is shewn to have been acting in collusion with the lessor of the plaintiff in an action of ejectment, the court will set aside the judgment against the casual ejector.—*Doe dem. Henderson v. Roe*, 366.

*Primâ facie right to inherit made out by plaintiff. Onus of proof of nearer heir on defendant.*] Where the plaintiff in ejectment, capable of inheriting and *primâ facie* entitled to inherit, makes out a reasonable case, the court will throw upon the defendant, especially if he be a stranger to the title, the onus of showing a nearer heir. Where, for instance, the plaintiff claiming by descent as the brother of an elder brother, dying without issue, proved by persons connected with the family, "that they had heard of the elder brother's marriage, many years ago, but knew nothing of his having any issue;" the court held this evidence sufficient, in the absence of any proof to the contrary, to entitle the lessor of the plaintiff to recover.—*Doe dem. Place v. Skae*, 369.

*Demand of possession.*] The mere fact of a vendor continuing in possession of land, without more being shown, does not entitle him to a demand of possession before bringing ejectment.—*Doe dem. Richardson v. Defoe*, 484.

*Satisfied mortgage in third party.*] *Semble*: that a satisfied mortgage in fee to a third party cannot be set up by a stranger, as a subsisting title to defeat the true owner of the estate.



*Semble* : that a widow cannot be allowed to set up a mortgage to a third party against the heir of the husband.—Doe dem. Kenny and wife v. Johnston, 508.

### ESTOPPEL.

*Tenant of Assignee.*] A. on the 14th of August, 1844, demises certain lands to B. and C., for a year, from 1st January, 1845. A. afterwards, on 23rd August, 1844, conveys in fee the land to D., taking back, on the same day, a mortgage to secure the payment of the purchase money on a certain day; the mortgagor to remain in possession until default. On the 1st of December, 1845, B., one of the lessees, lets E. into possession for a month, bringing the time up to the end of the term for which A. had demised to B. & C. E. refused to go out at the end of the month, upon which D. brought ejectment. *Held, per Cur.*, that E. was not estopped, as tenant of the assignee of A., from showing that the title the assignee had once held, and that but for a moment, had ceased by reason of the mortgage back to A., under which A. and not D., since the default, was entitled to possession, and that judgment should be entered for the defendant.—Doe dem. Marr v. Watson, 398.

### EVIDENCE.

*Trespass. Sheriff. Execution defendant.*] In an action of trespass brought against a sheriff, for seizing the plaintiff's goods, under an execution against the goods of A., *Held per Cur.*, that A. (the defendant in the execution) was an incompetent witness for the sheriff to prove that he, A., and not the plaintiff, was the owner of the goods.

*Held also*, that a letter written by A., before any third party had an interest in questioning the right of the goods, was good evidence to go to

the jury to shew the footing on which the plaintiff and A. then stood with respect to the goods.

*Semble* : that the precise point of time at which, upon a trial, particular evidence may be introduced, is matter exclusively for the judge at Nisi Prius to determine.—Robinson v. Rapelje, sheriff, 289.

*Promissory note. Notice of dishonor.*] What is or is not sufficient notice of the dishonor of a bill or note, when the facts are undisputed, is a question of law.

The holder of a bill or note need not show the notice of dishonor to have been absolutely received; due diligence in sending is sufficient.—The Bank of Upper Canada v. Smith, 483.

*Presumption of death.*] It was proved, at the trial, that A. was last seen in the province in December, 1827, and was never afterwards heard of. A *fi. fa.* against A.'s lands was placed in the sheriff's hands on 13th July, 1833; tested the 29th of June, 1833. The heir of A. brought an action of ejectment against the purchaser, under the sheriff's sale, and attempted to recover upon the ground that, after so many years (about 15) had elapsed over and above the seven years the law presumed A. to have been living since he was last heard of; the presumption that he did not die till the expiration of the seventh year, though there was no circumstance in evidence to shew that he died earlier, was at an end; and that it was incumbent on the purchaser at sheriff's sale, to shew that he did not in fact die till after the seventh year; and that the jury should be directed to find whether he did or did not die within the term of seven years. But *held per Cur.*, that the proper direction to give the jury was, that at the end of seven years the fact of death was to be presumed, and not sooner, unless there was some

evidence affecting the probability of life continuing so long; and also that it was incumbent on the heir of A., and not upon the purchaser under the *fi. fa.*, to shew when A. died.—*Doe dem. Hagerman v. Strong et al.* 510.

### FRAUD.

*Setting aside plea of release.*] The court will not interfere summarily to set aside a plea on the ground of fraud, except in manifestly clear cases.—*Waltenberger v. McLean*, 350.

### FORWARDER.

*Discretion of.*] Construction of contract entered into between the consignor and forwarder of goods, as to the discretion the forwarder may use, in the time, mode, and place of shipping and forwarding the goods.—*Fowler v. Hooker et al.* 18.

*Deviation from instructions.*] It is no defence to a forwarder deviating from his instructions, that after the deviation he told the plaintiff's agent that he had done so, and no objection was made by the agent. *Aliter*, if he had told the agent of his intention before the deviation, and could shew that the agent had any discretion in the matter.—*Fowler v. Hooker et al.* 18.

### GENERAL ISSUE.

*Malicious Arrest.*] Upon the general issue in an action for malicious arrest, the writ is not admitted.—*James v. Mills*, 366.

### GUARANTEE.

*Continuing. Extension of Time. Pleading.*] The plaintiff sued the defendant on the following guarantee.

"Port Hope, Nov. 14, 1845.

"I hereby hold myself accountable  
"to you, for any goods Mr. Francis  
"Murphy may purchase of you, to  
"the amount of 250*l.* currency."

"Signed, J. K. Burton."

It was proved at the trial, that the plaintiffs had sold goods to Murphy

on the 19th of Nov., 1845, amounting in all to 311*l.*, and that after the original credit of six months on the 311*l.*, understood between the parties at the time of sale, as the jury found, had expired, the plaintiffs had extended the time by taking notes without the privity of the defendant. It was also proved, that on the 2nd of April, 1846, other goods were sold to Murphy, to the amount of 83*l.*, for which Murphy at the time gave his bill at three months. The defendant pleaded a defence which covered only the first sale of 311*l.*, to which the plaintiffs, by their replication simply denying the truth of his defence, admitted his claim to be limited. *Held, per Cur.* 1st. That the guarantee was a continuing guarantee. 2ndly. That as the plaintiffs had extended the time of credit as to the 311*l.*, they had thereby discharged the defendant from any liability on that sum. 3rdly. That though the sum of 83*l.* might have been recovered under the continuing guarantee, yet that from the state of the pleadings without a new assignment the plaintiff could not recover in this action.—*Ross et al. v. Burton*, 358.

### INSOLVENT LAW.

*Judge's Order. Court of Review.*] It is not necessary under the 4th, 5th and 24th clauses of 8 Vic., ch. 48, that the judge's order under the *Insolvent Law* should be confirmed by the Court of Review, before it can operate as a discharge of the insolvent from actions.

The final order must comprise an order as well for the effects of the bankrupt, as for protecting his person and goods from process.—*Ferrie et al. v. Lockhart*, 477.

### INTEREST.

*Method of calculating.*] The method usually adopted in making out an account between debtor and creditor upon a loan of money, viz., that

of charging, first the interest upon the whole debt for the whole period, as if no payment had been made, then allowing interest upon each payment from the time it was made, and so deducting all the payments and interest from the whole debt and interest, is not the correct way of arriving at the balance. It is so much in favour of the *debtor*, that where there has been a long arrear of interest, and payments made on account of the debtor not covering the interest alone, the debtor in a few years, without adding any payment in the meantime, will make his *creditor* his *debtor* to a very large amount.—Sir James McGregor et al., *Executors, v. Gaulin et al.*, 378.

#### INTERPLEADER.

*Agreement for the sale of Timber. Ownership of Timber.*] Upon an agreement between A. and B., "that "certain timber should be marked for "B. as made, and should be delivered "as fast as made to his agent, and "should be to all intents and purposes his property to be held in security for his advances": *Held, per Cur.*, that the timber having been all made for B. and marked for him, part of it delivered and all brought out of the woods and taken possession of by B. and sold to C., who had actual possession for many weeks with the knowledge and apparent consent of A.; that such timber could not afterwards be seized by the sheriff as the property of A., merely because B. had not sent out an agent to receive the whole of it in the woods.—*Dunning v. Gordon*, 399.

#### JUDGE.

*Nisi Prius. Discretion of Judge.*] Except in cases of fraud, this court will seldom interfere with the discretion of a judge at *Nisi Prius*, in holding a plaintiff, after defects in his evidence have been pointed out, to the case which he has proved.—Ar-

*mour, Assignee of Boyd, a Bankrupt, v. Phillips*, 152.

*Chambers. Irregularity. Discretion of Judge.*] This court will very rarely indeed entertain an appeal against the decision of a judge in chambers declining to give effect to a motion for *irregularity*.—*Gilmour et al. v. Wilson et al.* 154.

*Nisi Prius. Amendment.*] The plaintiff, a schoolmaster, sued the defendant for a libel, and laid, as its consequence, by way of special damage, his dismissal from his school. Whereas it appeared at the trial, that the real effect of the libel was to prevent his being examined by the superintendent, with a view to his qualification to receive a renewed certificate. The plaintiff applied to the judge at *nisi prius* to amend his special damage to meet the evidence, which the learned judge allowed. *Held per Cur.*, on motion for a nonsuit, that the judge at *Nisi Prius* had power to make such an amendment.—*Jackson v. Simpson*, 287.

*Nisi Prius. Amendment—in demise—in ejectment.*] Where the demise in the declaration of ejectment is laid as joint, and the evidence shews a tenancy in common, the judge at *Nisi Prius* has not the power, under the statute 7 Wil. IV. ch. 3, of allowing an amendment.—*Doe dem. Cuvillier et al. v. James*, 490.

#### LANDLORD AND TENANT.

*Ejectment. Notice to quit.*] Where a tenant overholds for a considerable time, and the landlord asks him to pay rent, and he refuses to do so, he may be ejected without a notice to quit, or a demand of possession.—*Doe dem. Burritt v. Dunham*, 99.

*Overholding tenant.*] A tenant remaining in possession after the expiration of his term, and paying two months' rent, cannot, in the middle of the third month, be treated by his



landlord as an overholding tenant under the 4 Wil. IV., chap. 1.

*Quære*, does the statute 4 Wil. IV. ch. 1, apply in any case but the plain one of a tenant overholding after the expiration of a term expressly created by contract between the parties.—Adams v. Bains, 157.

*Distress. Stranger to lease.*] A. demises to B., for a certain term. B., during the term, absconds and abandons the property. C., finding the place vacant, puts a person in possession, and makes a demise to D. A. distrains for rent, under his lease to B. *Held per Cur.*, distress legal.—Rudolph v. Bernard, 238.

### LANDS.

*Subject to execution on judgment confessed by executors.*] *Semble*: that lands may be sold under a judgment confessed by an executor. That lands can be sold upon a judgment execution against the personal representatives of the testator, under the British statute 5 Geo. 2, ch. 7, is a point not now open to discussion before the court.—Doe dem. Lyon v. Legé, 360.

*Purchaser of—holds subject to judgment that has attached.*] Where a party purchases land upon which a judgment has attached, he holds the land subject to a right of sale under a *fi. fa.* by the judgment creditor.—Doe dem. McPherson v. Hunter, 449.

### LIEN.

*Waiver of.*] A. sends a waggon to B., to make the wood work. B., having finished the wood work, sends the waggon, in A.'s name, to a blacksmith, for the iron work. B. gets the waggon back again from the blacksmith's. A. calls for the waggon. B. allows him to remove the box of the waggon into the highway; but, on his returning to the shop to take out the running part of the waggon, B. refuses to let it go till he is paid his

bill. A. holds in his hands a quantity of notes, and offers to pay B. his demand, if he would tell him what it was. B. would not name any sum, and insisted upon detaining the waggon. *Held*, that B., by sending the waggon to the blacksmith's, had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon. *Held also*, that B., allowing A. to remove the box of the waggon into the highway, was no waiver of his lien. *Held also*, that it was for the jury to determine whether B. had not had full opportunity of seeing that A. was tendering him a sufficient sum to meet his demand; that if the jury were satisfied that he had, then that the tender was a good one, notwithstanding B. had refused to name the specific amount of his bill.—Milburn v. Milburn, 179.

### MAGISTRATE.

*Trespass. Notice of Action. Trover.*] Where it appears in the course of the plaintiff's evidence at the trial, that the defendant sued in trespass was acting *bona fide* as a justice of the peace, and the jury, upon that fact having been left to them by the judge, so find it, the plaintiff must prove that he had given the defendant a month's notice of action; and this proof is necessary, though the defendant has pleaded the general issue simply, without adding "by statute" in the margin.

Cattle, supposed to have been stolen, are taken by A., a constable, to B., an innkeeper, to feed and take care of. After some time B., wishing to be paid for his keep of the cattle, applies to C., a magistrate, who had nothing to do with the original caption, for directions. C. tells him to sell the cattle, and so satisfy his claims; this B. does. D., the owner of the cattle, sues C., the magistrate *in trespass*. *Held, per Cur.*, that as against the magistrate,

trover and not trespass should have been the form of action.

*Semble*: that under these circumstances, B., the innkeeper, would not be liable to the owner of the cattle in trespass.—*Marsh v. Boulton*, 354.

### MANDAMUS.

*Licenses. Board of Police of Niagara.*] Mandamus granted directing the Board of Police of Niagara to pay over to the inspector of licenses the sum of 240*l.*, received by the clerk of the board for tavern licenses for 1846 and 1847. The court deciding, that under the 17th sec. of 8 Vic., ch. 62, and 3rd and 4th secs. of 8 Vic., ch. 72, the government, and not the town of Niagara, were entitled to receive the dues upon such licenses.—*The Queen v. The Board of Police of Niagara*, 141.

*Right of Attornies to practise as Advocates in District Courts.*] *Per* Macaulay, J., and Jones, J.—Attornies of this court not being barristers cannot as of right be heard as advocates in the *district courts* of this province. Robinson, C. J., *dissentiente*.

The court, thus differing in opinion as to the right of attornies to practise as advocates in the district court, refused a mandamus to a judge of one of the district courts to admit an attorney to be heard therein as an advocate.

The result of this decision seems to be, to leave it *discretionary* with the district judge, either to grant or refuse to attornies the privilege of practising as advocates in his court.

### NAVIGABLE WATERS.

*Public nuisance. Private action.*] A person throwing noxious matter into Lake Ontario, or any other public navigable water, is liable both to an indictment for committing a public nuisance, and to a private action at the suit of any individual distinctly and peculiarly injured.—*Watson v.*

the City of Toronto Gas Light and Water Company, 158.

The right which an individual has to the use of public navigable water, in its pure and natural state, is not founded upon the possession of land, or of a mill or house adjoining the water, but simply upon the same common law right, which every other individual has, to use the water in its unadulterated state, whether he possess land, mills or houses, on its banks, or not.—*Idem*.

### NEW TRIAL.

The court grant new trials for the purpose of justice. They will not grant them to protract an idle litigation about facts which neither party will take the trouble to make clear, though the means of doing so are shewn to be within their reach. Where a jury, not thinking it safe to rely on verbal evidence as to the contents of a lost will, when the party offering it is shewn to have been aware of the existence of a written copy of the will, which he might have produced at the trial, give a verdict against him, the court will not grant a new trial.—*Doe dem. Wheeler v. McWilliams*, 30.

*Smallness of damages.*] The court will not grant a new trial at the instance of the plaintiff, on account of the smallness of his damages, except in very clear cases and under very particular circumstances. — *McDonald v. McDonald*, 133.

*Surprise. Promissory note.*] Where a defendant denied his endorsement of a note, and a witness who swore on his examination in chief to his having actually seen the defendant sign the note, but upon his cross-examination could not swear to the identity of the paper endorsed, and the plaintiff, expecting to prove the actual endorsement by his witness, was not prepared to prove the defendant's hand writing, and had a ver-

dict against him : the court granted a new trial, on payment of costs.—*Murphy v. Fraser*, 194.

*Verdict against evidence.*] The plaintiff, a sheriff, sues defendant for a breach of the condition of a bond, in not re-delivering to him certain goods seized in execution, on a certain day, at a certain inn. The defendant pleads that he offered them to the plaintiff, at the inn, on the day named. The evidence did not prove the defendant's plea. The jury were told by the learned judge that, the plea not being proved, the plaintiff ought to have a verdict for 6*l.*, the sum remaining unpaid upon the execution. They found, however, for the defendant. *Held per Cur.*, that, notwithstanding the smallness of the verdict, as the defendant's plea had not been proved, the plaintiff was entitled to the verdict, and that there must be a new trial without costs.—*Moodie, sheriff, v. Bradshaw et al.* 199.

*Malicious arrest. Want of probable cause.*] Where in an action for malicious arrest on a *ca. re.*, the learned judge at the trial was of opinion that want of probable cause had not been shewn by the evidence, and charged the jury strongly to that effect, but still did not *peremptorily* direct them to find for the defendant. The court granted a new trial without costs.—*Tyler v. Babington*, 202.

*Sheriff, action against.*] When a bailable case is delivered to the sheriff, he is bound to proceed with due diligence in the arrest of the party. If the jury, upon being charged that they were not to find for the plaintiff unless they were satisfied that there had been neglect on the part of the sheriff, from which the plaintiff had suffered *some* damage, return a nominal verdict in favor of the plaintiff, the court will refuse to set it aside, upon the ground that to sustain even a verdict for nominal damages, for

not arresting a defendant after mesne process, some clear proof of an injury received from the neglect to arrest should have been given by the plaintiff, and that no such evidence was offered.—*O'Connor v. Hamilton*, sheriff, 243.

*Several issues found for plaintiff and defendant.*] Trespass for breaking and entering the plaintiff's car-house, and for seizing and taking rail-cars, &c. Pleas. 1st. Not guilty. 2ndly. Plaintiff not possessed of car-house. 3rdly. That car-house was the freehold of A., and defendant, as his servant, &c., broke and entered car-house, and committed the said supposed trespasses in the declaration mentioned. 4thly. As to seizing, &c., the cars, and converting them, &c.; that they were not the plaintiff's. The jury gave a verdict for the plaintiff on all the pleas *but the third*, and that they found for the defendant. No damages were given to the plaintiff, the 3rd plea being taken to bar the action. *Held per Cur.*, on motion for new trial, that as the 3rd plea left unanswered the taking of the rail cars, the plaintiff should have a verdict for nominal damages; and that a *venire de novo* must be ordered, unless the defendant would consent to such a verdict being entered.—*Macklem et al. v. McMicking*, 264.

*Case for negligent driving.*] In an action on the case for negligent driving, where the fact of negligence goes fully to the jury, and they find for the defendant, and no misdirection on the part of the learned judge at Nisi Prius is complained of, the court, unless it appears that the evidence is conclusive in favor of the plaintiff, will not grant a new trial.—*Kenney v. Cook et al.* 268.

*Leaving evidence to jury without comment.*] When the learned judge at Nisi Prius consents with reluctance, from his connection with the plaintiff, to try a cause, and, from a feel-



ing of delicacy, merely gives the case to the jury without comment, leaving them to make out the points from the evidence as they can, the court, though the evidence may be very conflicting, if they see that the plaintiff has been probably prejudiced by the case not having been left to the jury in as full a manner as it would have been under other circumstances, will grant a new trial, with costs to abide the event.—*Boulton v. Cooper*, 278.

*Surprise.*] The court will not grant a new trial upon the ground of surprise, unless in clear cases and where the grounds are *strong and specific*; if the surprise is the discovery of a witness of whom the plaintiff was not aware at the time of the trial, it must be stated what evidence such witness can give; and generally the witness himself must shew the court on affidavit what facts he can prove.—*Robinson v. Rapelje, Sheriff*, 289.

*Replevin. Perverseness of Jury. Costs.*] Where the court has set aside a verdict for the defendant in *replevin*, upon the ground that he had no legal right of distress, and the jury have found a second time for the defendant, the court will almost always grant a second new trial to the plaintiff without costs.—*Sanderson & Murray v. The Kingston Marine Railway Company*, 340.

*Complicated Accounts. Conjecture. Excessive Damages.*] Where a plaintiff and defendant have had open accounts for a long period, and have taken no pains to come to an understanding in regard to the terms of their dealing, or to preserve the means of proving the necessary facts, and the jury find more or less upon conjecture what the court may think excessive damages for the plaintiff, the court will very rarely indeed on that ground assist the defendant by granting a new trial.—*Corner v. McKinnon*, 350.

*Abatement. Conflicting Evidence.*] The court will not as a mere matter of indulgence give a defendant a second chance of obtaining a verdict on a *plea in abatement*, where the evidence is conflicting or leaves the fact of joint liability doubtful. *Secus*: if the verdict for the plaintiff is clearly contrary to law.—*Tossell et al. v. Dick et al.*, 486.

## NONSUIT.

*Award. Variance.*] A variance in the names of arbitrators as stated in the declaration, the agreement and award, is no ground for a nonsuit.—*Bentley v. West*, 98.

*Remanet.*] Where a cause has been once taken down to trial, and made a remanet of, the defendant cannot afterwards obtain judgment as in case of a nonsuit in a country cause.—*Doe dem. Dodge v. Rose*, 174.

## NOTICE OF ACTION.

*Bailiff.*] The statement of a bailiff, that "he believed the cattle to be the "plaintiff's" when he seized them on execution against the person in whose possession they were, does not divest him of the character of bailiff, so as to make it unnecessary to serve him with a notice of action.—*Sanderson v. Coleman*, 119.

*Trespass. Trover.*] Where it appears in the course of the plaintiff's evidence at the trial, that the defendant sued in trespass was acting *bona fide* as a justice of the peace, and the jury, upon that fact having been left to them by the judge, so find it, the plaintiff must prove, that he had given the defendant a month's notice of action; and this proof is necessary, though the defendant has pleaded the general issue simply, without adding "by statute" in the margin.

Cattle, supposed to have been stolen, are taken by A., a constable, to B., an innkeeper, to feed and take care of. After some time B., wishing to

be paid for his keep of the cattle, applies to C., a magistrate, who had nothing to do with the original caption, for directions. C. tells him to sell the cattle, and so satisfy his claims; this B. does. D., the owner of the cattle, sues C., the magistrate, *in trespass*. *Held, per Cur.*, that as against the magistrate, trover and not trespass should have been the form of action.

*Semble*: that under these circumstances, B., the innkeeper, would not be liable to the owner of the cattle in trespass.—*Marsh v. Boulton*, 354.

### NUISANCE.

*Navigable waters.*] A person throwing noxious matter into Lake Ontario, or any other public navigable water, is liable *both* to an indictment for committing a public nuisance, and to a private action at the suit of any individual distinctly and peculiarly injured.—*Watson v. the City of Toronto Gas Light and Water Company*, 158.

### PARTNERS.

*Account Stated.*] A., one of two partners, makes the following entry in the partnership books: "I have 'this day (5th April, 1841) examined our books, and find them 'correct; and a balance due my co-partner of 288l.'" *No promise* to pay the balance is proved by B. the co-partner; and subsequently to that entry the two partners *continue the partnership business*, and afterwards finally settle and dissolve. *Held, per Cur.* that B. has no right of action against his co-partner A. upon the balance stated in the entry.—*Allan v. Garven*, 242.

### PARTICULARS OF DEMAND.

*Admission of. Payment in. Evidence to go to the Jury.*] Particulars of demand served by the plaintiff on

the defendant, containing an admission of payment on account, and shewing a balance in favour of the plaintiff, are put in at the trial by the defendant to prove the payment. The plaintiff then relies upon the particulars so put in by the defendant as a link in the chain of evidence, to shew that he was entitled to a verdict for the balance therein mentioned.

*Held*, that though the particulars rendered by the plaintiff, and made use of by the defendant, were not evidence *per se* of the balance as therein stated, still that the whole of the particulars ought to go to the jury as a fact, in connection with other facts in the case, to assist them in forming their verdict.—*Kesar v. Empey et al.*, 47.

### PAYMENT.

*Note. Credit in account.*] Where A., the indorsee of a note, sued B., the payee, and it was proved by C., the maker, that the note was made an item in the current account between A. and C. (the maker); that it was long before charged to the maker as a debt due by him, and that when it was so charged the balance was in the maker's favour: *Held, per Cur.*, that upon such evidence the note must be taken to have been paid by the maker: *Held also*, that the note must be considered as paid by the maker, as soon as subsequent credits are admitted by A. sufficient to cover the note, though at the time of the note being charged the balance was not in C. (the maker's) favour.—*McGillivray v. Keefer*, 342.

*Application of payments. Interest.*] Where the defendant is making payments to the plaintiff on account of a loan, the plaintiff may insist, in the absence of any agreement to the contrary, that the payments be applied in the first place to keep down the interest.—*Sir James McGregor et al., Executors, v. Gaulin*, 378.

## PLEADING.

*Recital of Statutes. Inaccuracy of Description.*] To recite certain statutes, as statutes of the Province of "Canada," when they are in fact statutes of the former Province of "Upper Canada," is bad on general demurrer.

It is also bad on general demurrer to refer to any statutes as having been passed in *two of the years* (as the fourth and fifth) of her Majesty's reign.—Huron District Council v. London District Council, 302.

*Assault. Justification. Reply. Demurrer.*] Where to an action of trespass for an assault the defendant justified under a bailable writ, and the plaintiff replied that the arrest was ordered to be set aside, without stating *upon what grounds*, and without averring that the arrest so set aside was the same arrest under which the defendants justified: *Held, per Cur.*, on special demurrer, replication bad for both the causes assigned.—Monforton v. Monforton et al., 338.

*Qui tam. Declaration.*—Where a declaration in a *qui tam* action for a penalty, under the statute 32 Hen. VIII. ch. 9, for buying a pretended title, states the facts which give a claim to the penalty, and then avers the right to the plaintiff to sue for and have the penalty for himself and her Majesty—to which the defendant pleads *nil debet*: *Held, per Cur.*, that the declaration sufficiently avers as a breach the non-payment by the defendant of the penalty. *Held*, also, that it is not necessary that the declaration should describe more particularly than it does the land bargained and sold, at least after verdict.—Baldwin *qui tam* v. Henderson, 361.

*Plea.*] Answering only part of cause of action, pleaded to the whole, bad.

To a declaration for "maliciously

causing the plaintiff to be arrested," the defendant pleaded that he did not make the affidavit stated in the declaration. To this the plaintiff demurred, assigning for special cause, that the plea amounted to the general issue, and that while professing to answer the whole cause of action it answered only part; and that it tendered an immaterial issue. *Held, per cur.*, plea bad, as professing to answer the whole, while it only answered a part, and as tendering an immaterial issue.—Long v. Lee, 377.

*Slander.*] *Quære*: In an action of slander, as to the degree of certainty required in making the colloquium refer to the inducement.—Marter v. Digby, 441.

*Statute of Limitations. Replication, Rejoinder and Demurrer.*] To a plea of the Statute of Limitations, the plaintiffs replied absence beyond seas, to this the defendant rejoined, that after the making of the promises, &c., and upwards of six years before the commencement of this suit, viz., on, &c., he the defendant was at London in England, &c., where the plaintiffs then resided, and continued there for ten days, of which the defendant had notice; and that the plaintiffs did not commence their action within six years after he returned to Upper Canada. To this the plaintiffs demurred. *Held*, demurrer good.—Lane et al. v. Small, 448.

The defendant pleads the Statute of Limitations, the plaintiff replies absence in England, the defendant rejoins, that the plaintiff has an agent in the province transacting his business, and that he might have sued: *Held, per Cur.*, that this rejoinder could not give the defendant the benefit of the statute.—Lane v. Stennett, 440.

*Plea. Lease. Averment of consideration different from that contained in the Lease. Demurrer.*] The averment of some other consideration or



inducement for the making of a lease, than the annual rents mentioned in the lease, is not necessarily a contradiction of the lease, and therefore bad. A plea, averring some other consideration, must shew *that* consideration passed and executed *before the giving of the lease*.

After breach of the condition of a lease, the acceptance of some collateral thing in satisfaction cannot be pleaded in bar of an action on the lease.—*McIntyre v. The City of Kingston*, 471.

*Case. Plea. Demurrer.*] In an action for wrongfully dismissing the plaintiff, a school-teacher, a plea averring the dismissal of the plaintiff by a third party, authorised by law to do so, is bad, as being an argumentative denial of the wrong complained of.—*Campbell v. Black et al.*, 488.

*Demurrer.*] It is no ground of demurrer to write by mistake in the pleadings "plaintiff" instead of "defendant," where there can be no doubt as to what was meant.—*Hayward v. Harper*, 489.

*Debt on Bond. Declaration. Averment.*] Debt on bond, with a condition to be void if certain payments should be made at the times *stated in the condition*, with an averment as a breach, *that 125*l.*, parcel of the sum demanded, was not paid*, &c. Demurrer to declaration. *Per Cur.*, declaration bad, in not negating the payment of the money mentioned in the condition.—*Beckett v. Oill*, 489.

*Malicious arrest. Affidavit to arrest. Assault. Justification.*] In an action of trespass for an arrest under a *ca. re.* against the plaintiff arresting there is no necessity to set out in the declaration the affidavit to arrest. *Semble*: that to a declaration in trespass for assaulting, seizing and laying hold of the plaintiff, and *pulling and dragging him about*, the plea justifying the arrest by virtue of legal process

was no answer to the pulling and dragging about.—*Beamer v. Darling*, 211.

*Debt on Judgment. Style of the Court of Queen's Bench.*] The plaintiff declares upon a judgment, and gives the following description of the Court of Queen's Bench, in Toronto. "For that whereas the said plaintiff, "in the 9th year of the reign of our "lady the now Queen, *in the Court "of our said lady the Queen, before "the Queen herself, by judgment of "the same court, recovered a judgment, &c., as by the record still remaining in the same court of our "said lady the Queen, before our "said lady the Queen, at Toronto "aforesaid, more fully appears.*" *Held*, on demurrer to this description of the court as being uncertain, description good.—*French v. Kingsmill, Sheriff*, 215.

*Special Traverse. Promissory Note. Usury.*] The plaintiff, the indorsee of a note, declares against the indorser, to whose order the maker had made the note payable. *The defendant is averred to have endorsed the note to the plaintiff.* The defendant pleads by way of special traverse, admitting in the inducement the making and indorsing of the note as in the declaration mentioned, and then sets out a charge of usury between the maker and one A. B., to whom it is averred the maker delivered the note; and that A. B. afterwards *delivered the same to the plaintiff*, who received the same with knowledge of the usury, "without "this, that the defendant did indorse "the said note in the said declaration "mentioned, in manner and form as "the plaintiff hath above thereof "complained against him; and of "this the defendant puts himself "upon the country, &c." Special demurrer, that no certain or material issue was offered or could be taken upon the plea, and that it ought to

have concluded with a verification. *Held*, plea good on the exceptions taken.

*Semble*, however, that the plea is bad for duplicity.—*Dowding v. Eastwood*, 217.

*Demurrer.*] The plaintiff declares in debt for 1000*l.* upon three counts, 500*l.* work done, 100*l.* money paid, and 400*l.* account stated, which said sums are to be respectively paid on request. The defendant pleads, that before any of these causes of action accrued, by an agreement made between them under seal, of which they make profert, the plaintiff agreed to build a house for them according to certain specifications; that it was stipulated in that agreement, that any extra work in addition to the specifications should be done under the written instructions and superintendence of their architect, and should be valued by him, and be paid for according to his estimate; that certain extra work was done by the plaintiff under the direction of their architect, which was valued by him as the agreement provided; that "such extra work is the "cause of action *in the declaration alleged and for which this action was brought*;" that it was duly valued by the architect at 355*l. 5s. 2d.*, and that before this action was brought they paid to the plaintiff the said sum of 355*l. 5s. 2d.*, in full "satisfaction and discharge of the said "extra work, and of all damages and "demands in respect thereof, being "the said causes of action in the "said declaration mentioned." Demurrer to plea, that it does in effect amount to a less sum being pleaded in satisfaction of a greater. *Held*, plea bad on the exception taken.—*Ritchey v. The Bank of Montreal*, 222.

*Bond. Plea. Demurrer.*] Where, to a bond conditioned that the defendant should "*well and truly convey* in fee simple to the plaintiff, his

heirs and assigns for ever," the defendant pleads that he did make, seal and execute, *a conveyance* in fee simple to the plaintiff. *Held*, on demurrer, plea bad, being no answer to the condition.—*Prindle v. McCann et al.*, 228.

*Payment. Bond.*] A plea of payment of a sum of money in satisfaction and discharge of a bond, conditioned to do a collateral thing, is bad, unless it avers that the payment was made after the time for performance was past, and after a breach had been incurred.

A loan of money cannot be pleaded in satisfaction and discharge of a bond and conditions.—*Prindle v. McCann et al.*, 228.

*New Rules.*] It is no ground of demurrer that a declaration upon a bill or note does not conform to the new rules, if it be otherwise good in itself.—*Acheson v. McKenzie*, 230.

*Promissory note.*] It is not necessary in declaring upon a bill or note, after stating the defendant's promise, to aver *his legal liability* to pay the bill or note to the plaintiff.—*Acheson v. McKenzie*, 230.

*Trover. Colorable and immaterial matter. Demurrer.*] To an action of trover, for 3000 feet of oak timber and 200 bushels of wheat, the defendant pleads that he was seised in fee of a certain close, and being so seised, &c., he cut the said timber and wheat thereon growing, and afterwards, &c., delivered the same to one A. B., to be kept, who delivered them to the plaintiff; wherefore the defendant took them out of his possession, &c. The plaintiff replies, that the property was the plaintiff's property, without this, &c. Demurrer to replication, that it traversed colorable, immaterial matter: also general demurrer to the plea, that it does not shew that the property belonged to the defendant. *Held per Cur.*, replication bad. *Held* also, plea good on general demurrer.

*Quære* : if good on special demurrer?—*Millard v Kirkpatrick*, 248.

*Joint trespassers. Separate acts of trespass.*] Where the plaintiff (defendant in a *capias*) sues the sheriff, and the plaintiff in the writ arresting him as *joint trespasser*, he must take care that his record of the pleadings does not shew him to be proceeding against the sheriff for one act of trespass, and against the plaintiff in the writ for another act of trespass. Where the record does show this, the court will set aside a verdict obtained by the plaintiffs against both the defendants, on the issues raised.—*Eccles v. Moodie, sheriff, and Barrie*, 250.

*Contract. Averments.*] In an action for the non-delivery of wood according to contract, the declaration did not state the *price* to be paid for the wood; neither did it aver that the wood *was to be paid for*, either on delivery, or on a certain day; neither did it aver that the plaintiff *was ready and willing to pay* for the wood. *Held*, on special demurrer, declaration bad for the omission of any one of these averments.—*Mad-dock v. Stock*, 118.

*Trespass. Costs.*] The plaintiff sues in trespass *in one count*, for breaking and entering his house and *taking away goods*. The defendant justifies the *breaking and entering*, in one plea; and in another plea, he denies the *goods* to be the plaintiff's. The defendant has a verdict upon the first plea, and the plaintiff upon the second, for 30s. *Held*, that the plaintiff was entitled to judgment in the action and the costs of the cause.—*Evans v. Kingsmill, sheriff*, 132.

*Pleading. Bill of Exchange. Demurrer.*] The plaintiff declares against the drawer and acceptor of a bill of exchange under 100*l.*, in one action. The acceptors sign as parties *jointly* liable.—*Held*, that an averment that the parties became jointly and *severally* liable, is bad on demur-

rer. The form given in 3 Vic. ch. 8, must be adopted with reference to the mode in which the several parties to the bill or note make themselves liable.—*The Bank of Upper Canada v. Gwynne et al.*, 145.

*New assignment.*] The plaintiff declares in trespass, in one count, for breaking, &c., on the 20th of November, 1845. The defendant justifies as assignee under a commission of bankruptcy issued against the plaintiff. The plaintiff new assigns other trespasses committed on the said 20th of November, 1845; to which the defendant pleaded "not guilty." At the trial, the plaintiff proved but one trespass committed. *Held*, that under the pleadings, plaintiff should be non-suited.—*Henderson v. Beekman*, 150.

*Case. Damages. Commencement of the action.*] *Semble* : that in an action on the case, a declaration would be open to special demurrer in claiming damages for an injury stated to have been committed, or at least continued, after the action had been commenced.—*Watson v. the City of Toronto Gas Light and Water Company*, 158.

*Escape.*] *Semble* : that in an action against a sheriff for an escape on a writ of attachment for non-performance of an award, the omission by the plaintiff to aver that the sheriff had not the party before the court at the return of the writ of attachment, though not bad on general, would be bad on special demurrer.—*Huntley v. Smith, sheriff*, 181.

*Fraud. Promissory note.*] A plea that promissory notes were obtained by fraud and covin and without consideration, is bad for duplicity.—*Smith v. Oates*, 185.

*Argumentative plea.*] The plaintiff suing as holder of a note payable to B. or bearer, avers that B., the payee of the note, transferred and delivered it to plaintiff. The defendant pleads,



not traversing the fact that B. did assign the note to the plaintiff, but denying it by relating the transaction in a wholly different manner—averring that the plaintiff took the note by delivery from other parties, having no connection or interest with B. *Held*, plea bad on demurrer, as being an argumentative denial that B. assigned the note to plaintiff.—*Smith v. Oates*, 185.

*Promissory note. Foreign Language.*] In declaring on a promissory note in a foreign language, it is not necessary to declare in such language; and where a foreign word is used, its meaning in English may be averred without any introductory statement that such word is of such a language and of such a signification in English.

The plaintiff, indorsee of a note, declares against the defendant, the maker, for that the defendant made his promissory note, and thereby promised to pay B. or order "*the sum of two hundred louis, current money, meaning thereby the sum of two hundred pounds of lawful money of Canada.*" *Held*, on demurrer to the declaration for unwarrantably extending the meaning of the word "*louis*," that the declaration was good.—*Gibb v. Morissette*, 205.

*Replication. Duplicity.*] To an action on a note, the defendant pleads that he was induced to make the note by *the fraud, covin and misrepresentation*, of the plaintiff. The plaintiff *replies*, that he did not cause the defendant to make the note by *fraud, covin and misrepresentation*, in manner and form, &c. *Held*, on demurrer to replication for duplicity, replication good.—*Cox v. Cox*, 207.

*Bailiff. Justification. Demurrer.*] The plaintiff declares in trespass for breaking and entering the plaintiff's close, in the Niagara District, &c. The defendant pleads, that, being a bailiff of a division court in the dis-

trict of Brock, he committed the alleged trespass in discharge of his duty as such; and that no notice was given to him of the action one month before it was brought. Demurrer to the plea, on the ground that it is not shewn by what authority the defendant, a bailiff in the Brock district, acted in the district of Niagara, where the trespass is laid. *Held*, plea bad.—*Davis v. Moore et al.*, 209.

## PRACTICE.

*New Trial, time of moving for.*] The court will not entertain a motion for a new trial after the first four days of the next term, unless under very special circumstances.—*White v. Church*, 23.

*Return of writ. Continuance.*] Where there have been several writs of *ca. re.* sued out and the last served, the plaintiff (with reference to a plea of payment, or the statute of limitations), in order to give himself the advantage of having the action considered as being commenced by the first writ, must shew at the trial that the first writ was returned.

*Semble*: that the continuance between the intermediate writs may be entered at any time.—*McLean v. Knox*, 52.

*District Court. Excess of jurisdiction. Remission of excess.*] *Semble*: that the plaintiff, upon a verdict in the district court for twenty-seven pounds, upon an unliquidated claim, may retain his verdict by remitting the 2*l.*, the excess of jurisdiction.—*Jordan v. Marr*, 53.

*Semble*: that in an action of debt instead of assumpsit, the judgment might be arrested.—*Idem*.

*Amendment of verdict.*] *Semble*: that the judge may amend a verdict, with the assent of the jury, at any time before they are discharged.—*Idem*.

*Amendment. Replevin.*] Where there have been two leases between the plaintiff and the defendant in re-

plevin, and the defendant avows under the wrong one, the court will allow him to amend at the trial, if the amendment cannot be shewn to prejudice the plaintiff. — *Edwards v. Holmes*, 94.

*New trial.*] It is no ground for a new trial, that the judge at *Nisi Prius* refused to allow the plaintiff, after he had closed his case, to supply the evidence of a fact he had omitted to prove. — *Benedict v. Boulton et al.* 96.

*Nonsuit. Judgment by default.*] A plaintiff may be nonsuited as to some of several defendants, though judgment by default has been entered against the others. — *Benedict v. Boulton et al.*, 96.

*Amendment.*] After an unsuccessful demurrer, the court, in the exercise of their discretion, will sometimes refuse to allow a party to amend and plead to the action. — *Bacon v. McBean et al.*, 104.

*Attorney. Demand of plea.*] An attorney, under the 10th rule of Easter Term, 5 Vic., must still be served with a demand of plea *in term time*. — *Gibb v. Miller*, 113.

*Service of process on a party to a suit, attending court thereon.* — The court will not set aside the service of process for irregularity, upon the ground that it was served on the defendant while he was attending at the assizes as plaintiff in a civil suit pending and entered for trial. — *The City of Kingston v. Brown*, 117.

*Common Bail. Irregularity. Waiver.*] The plaintiff enters common bail for the defendant, without having filed an affidavit of the service of process; declaration is served and plea demanded. The defendant moves for further time to plead and to change the venue, the plaintiff afterwards signs interlocutory judgment, which the defendant moves to set aside for irregularity in the entry of common

bail. *Held*, that the entry of common bail by the plaintiff, without filing the affidavit of service of process, was an irregularity only, which the defendant by his subsequent conduct had waived. — *Bridges v. Case*, 127.

*Issues in fact and law. Judgment and execution. Costs.*] The defendant demurs to one of the counts in a declaration, and takes issue on the others. The plaintiff goes to trial, and assesses contingent damages on the demurrer for one farthing. The plaintiff succeeds on the demurrer, and the defendant has a verdict upon all the issues.

*Held*, that the defendant is entitled to his costs of the issues in fact, and may have judgment and execution for them. — *Taylor v. Carr*, 149.

*Attachment. Staying.*] Where expenses have been vexatiously incurred in the conduct of a suit, by the attorneys on both sides, the court, to protect the client, will order an attachment for non-payment of costs, though regularly issued, to be stayed *without costs* upon payment of the money due. — *The Queen v. Cameron*, in the suit of *Playter v. Cameron*, 165.

*Parties to Rule Nisi. Order. Joint contract. Verdict and nonsuit.*] The plaintiff sues A., B. and C., on a joint contract. B. allows judgment to go by default. The plaintiff failing to prove the joint contract, accepts a nonsuit as to B. and C., and takes a verdict against A. A. moves in term to set the verdict aside. B. and C. are not made parties to the rule. The court make the rule nisi absolute. The order is not served on B. and C. neither do they adopt or act upon it. B. and C. afterwards enter judgment on the nonsuit, which the plaintiff moves to set aside.

*Held*, that B. and C., not being parties to the rule nisi, are not bound by the order made thereon, unless they can be shewn to have been served

with it, or to have adopted or acted upon it.

*Semble* : that rules nisi do not become rules absolute, though ordered to be made so by the court, until after they are drawn up or issued.—*Commercial Bank v. Hughes et al.*, 167.

*Misjoinder. Nolle prosequi. Nonsuit* ] In joint actions of assumpsit, a misjoinder of the defendants cannot be cured either by a nolle prosequi, or by a nonsuit as to some of the defendants. A nonsuit as to some is a nonsuit as to all; and a verdict returned for some of the defendants is null and void.—*Commercial Bank v. Hughes et al.*, 167.

*Cognovit, judgment on old.* ] The court will order judgment to be entered upon a cognovit seven years old, upon an affidavit from the plaintiff, stating that, having recently received a letter from the defendant, he believes him to be still alive, though the affidavit does not state that the defendant wrote or signed the letter.—*Oliphant v. McGinn*, 170.

*Irregularity—Four day rule.* ] A party, moving to set aside the proceedings of another for irregularity, must be strictly regular in his own. Where, for instance, a party takes out a four-day rule on the Wednesday before the end of term, and neglects to serve it till Friday, the court will not allow him to amend his rule so as to make it returnable on Saturday.—*Hunter v. Thurtell et al.*, 170.

*Affidavit. Commissioner.* ] The commissioner taking an affidavit need not state himself to be a commissioner.—*Masecar v. Chambers et al.*, 171.

*Attachment, affidavit for.* ] An affidavit for an attachment on an award is bad, in not denying payment of any part of the sum demanded.—*Masecar v. Chambers et al.*, 171.

*Award, enlargement of time for making.* ] Where the time for making

an award is enlarged, the enlargement, as well as the original submission, must be made a rule of court.

Where money by the award is to be paid to the plaintiff or to the plaintiff's attorney, the attorney cannot substitute another attorney under him to receive the money.—*Masecar v. Chambers et al.* 171.

*Rule of Court.* ] If a rule of this court is informal in its entitling, the party must move to set it aside; while it continues in force it must be obeyed.—*Heathers v. Wardman*, 173.

*Award. Affidavit of execution.* ] The affidavit proving an award must shew that it was executed within the time limited by the submission.—*Idem*.

*Award. Service.* ] An affidavit denying service of an award must be entitled in the cause, and not the Queen v. Defendant, as it is an affidavit made before the attachment has been ordered. If the affidavit however contain a good answer upon the merits, the party will have leave to swear to an amended affidavit.—*Heathers v. Wardman*, 173.

*Nonsuit. Remanet.* ] Where a cause has been once taken down to trial, and made a remanet of, the defendant cannot afterwards obtain judgment as in a case of a nonsuit in a country cause.—*Doe ex dem. Dodge v. Rose*, 174.

*Arrest. After agreement not to arrest.* ] Where a debtor leaves the province, and returns upon an agreement that he is not to be arrested, provided he immediately proceed to the settlement of his estate, and one of the creditors upon his return arrests him, alleging that he has broken the condition upon which he was not to be arrested, and the debtor applies to the court to set aside the arrest, the court will not discharge him from the arrest, but will leave him to his action on the agreement.—*Sutherland v. Murphy*, 176.



*Service, affidavit of.*] The affidavit of service, upon which the rule for an attachment is founded, is good, though it state the service as made on the day of a certain month *instant*, without stating the *year*.—The Queen v. Tomb, 177.

*Filing Similiter—Demurrer after—conclusion to the Country.*] The plaintiff replies *de injuria* to the defendant's plea, concluding to the country with an &c. The plaintiff makes up the Nisi Prius record adding the similiter, &c. Ten days after the assizes have commenced, and a month after replication had been served, the defendant demurs to the replication. The plaintiff proceeds with the trial and has a verdict. The defendant moves to set it aside for irregularity, there being no similiter on the files of the court, and the plaintiff paying no attention to the demurrer. *Held*, that under the Rule of Court, 19 Easter Term, 5 Vic., there was no necessity to file a similiter. *Held also*, that under the 36th Rule Easter Term, 5 Vic., if the defendant wished to demur to the replication, he might do so by serving within the proper time a copy of the demurrer upon the plaintiff.—Duncombe v. Fonger et al., 192.

*Rule to discontinue. Payment of Costs.*] Unless the plaintiff, upon taking out a rule to discontinue, serves the defendant at the same time with an appointment to tax costs, the defendant may regard the rule to discontinue as a nullity.—Perrin et al. v. Eaglesum, 254.

*Judgment as in case of a nonsuit.*] Where a plaintiff does not proceed to trial pursuant to notice from the absence of a material witness, and before the term requests the defendant's attorney not to put him to the expense of moving for judgment as in case of a nonsuit, offering to enter into the peremptory undertaking, to

pay the costs of not proceeding to trial, and to satisfy the plaintiff that he would be entitled to discharge a rule for a nonsuit. *Held, per Cur.*, rule discharged on peremptory undertaking, the plaintiff paying no costs except those for not proceeding to trial.—Doe ex dem. De Reimer v. Glass, 255.

*Endorsement of Bailable Process.*] Where an arrest is made upon a judge's order, and no sum is specified in the affidavit, the statute 2 Geo. IV., ch. 8, does not apply. *Semble*: if the sum is mentioned in the affidavit and endorsed in the margin of the writ, that would be sufficient, without endorsing it *on the back of the writ*.—Sligh v. Campbell, 255.

*Attorney. Service of demand of Plea. Irregularity.*] Where a plaintiff serves a defendant, an attorney, with a demand of plea *in vacation*, and signs judgment and serves his notice of assessment, if the defendant applies, within a *reasonable time* after judgment has been signed, to set aside the judgment for irregularity, he will succeed. The defendant has not waived the irregularity of the plaintiff's proceedings, by neglecting to move to set aside the demand of plea.—Moffatt v. McMartin, one, &c., 256.

*Judgment as in case of a Nonsuit. Amendment. Payment of Costs.*] Where a cause has been taken down to trial and withdrawn, and in the ensuing term a rule for judgment as in the case of a nonsuit is discharged, upon the peremptory undertaking and payment of costs, and the plaintiff afterwards obtains a judge's order to amend his declaration on payment of costs, and without paying the costs in both cases, serves the defendant with his amended declaration, the court set aside the filing of the amended declaration with costs.—Mad-dock v. Corbett, 257.

*Award, Rule Nisi to set aside.*] In the rule nisi to set aside an award, it must be stated that the rule is drawn up on reading the award or a copy of it. The omission of these words is fatal.—*Wilkins v. Peck*, 263.

*Dower. Summons and Grand Cape.*] Where a writ of summons is taken out by the demandant in dower against the tenant, to which he appears, and afterwards the demandant issues a grand cape, and serves it upon the tenant and he fails to appear, and a writ issues to the sheriff on judgment by default against the tenant, the court will not set aside the proceedings because the tenant appeared to the summons.

*Semble*: if the tenant has a good defence on the merits, he must shew to the court what his merits are.—*Cox v. Hand*, 281.

*Interlocutory judgment, application to set aside. Reference to judge at Nisi Prius.*] *Semble*: that where an interlocutory judgment has been signed, and the plaintiff is preparing for his assessment of damages in an outer district, a judge in chambers, upon an application made to him immediately before the holding of the assizes in the outer district, will not interfere to let the defendant in to plead, but will refer the parties to the judge of assize about to open the assizes in the outer district.—*Bellows v. Condee et al.*, 346.

*Fraud. Setting aside plea.*] The court will not interfere summarily to set aside a plea on the ground of fraud, except in manifestly clear cases.—*Waltenberger v. McLean et al.*, 350.

*Rule nisi. Statement of objections.*] The court will not disturb a verdict upon an objection taken upon the argument of a rule nisi, which had not been disclosed in moving the rule.—*Corner v. McKinnon*, 350.

*Costs. Certificate for Queen's Bench costs.*] A certificate for costs, either under the Division Court Act or under the District Court Act, must be moved for *immediately after* the verdict is rendered; and if not moved for then, or moved for and refused, no discretion remains with the court, or with the judge who tried the cause, to grant a certificate for costs afterwards. *Semble*: that if a plaintiff thinks he is entitled upon the record to Queen's Bench costs, without the aid of a certificate, his course is to tax his costs in the first instance, and if the master will not allow him full costs, then to apply for a revision of taxation.—*Malloch v. Johnston*, 352.

*Amendment. Verdict.*] Where the plaintiff has a general verdict upon a record containing several counts, and the defendant moves to arrest the judgment on the ground that some of the counts are defective, and the plaintiff asks leave, on the return of the rule, to amend his verdict by confining it to a good count. *Held per Cur.*, that if the evidence at the trial applies *equally* to the good and bad counts, the amendment may be made.—*Baldwin qui tam. v. Henderson*, 361.

*Ejectment. Judgment against casual ejector. Collusion. Irregularity. Waiver. Costs.*] Where the tenant in possession is shewn to have been acting in collusion with the lessor of the plaintiff in an action of ejectment, the court will set aside the judgment against the casual ejector.

Where the judgment is irregular, and the landlord, when first applying to a judge in chambers to be admitted to defend as landlord, takes no notice of the irregularity, the irregularity is waived. The court, though setting aside the judgment, will not order the tenant in possession to pay costs, but will leave the landlord to his remedy under the statute 11 Geo. II.—*Doe dem. Henderson v. Roe*, 366.

*Notice to produce.*] The sufficiency of a notice to produce, with respect to the time of service, seems to rest with the judge presiding at the trial.

*Quære.* Can a notice to produce be served on the agent of the defendant's attorney.

*Quære, also.* Has the plaintiff a right to call on the defendant's attorney in court to say whether he has or has not the writ in his possession.—James v. Mills, 366.

*Affidavit to hold to Bail.*] In an affidavit to hold the defendant to bail, "for goods sold and delivered by the plaintiffs to the defendant," it is not necessary to state, that such goods were sold and delivered *at the defendant's request*.

*Semble:* that the *request* must be stated in an action for money paid.

*Semble:* that it need *not* be stated in an action for money lent.—Ogilvie et al. v. Kelly, 393.

*Semble also:* it must be shewn that the goods were sold and delivered by the *plaintiff* to the *defendant*.—McDonell v. Kelly, 394.

*Process. Notice to appear.*] The endorsement upon the copy of a writ of *ca. re.* requiring the defendant to appear on a certain day, must contain in the mention of the day and month the *correct* return day of the writ.—Patterson v. Attrill et al, 395.

*Rule Nisi. Staying Proceedings.*] *Semble:* that proceedings are stayed from the *time of the making* of the rule to stay proceedings, and not from the service of the rule.—Patterson v. Attrill et al., 395.

*Fi. Fa. Ven. Ex. Attachment against Sheriff.*] Where a levy is made by the sheriff under a writ of *feri facias*, and he returns goods on hand for want of buyers, and a writ of *venditioni exponas* is then sent to the sheriff, that writ will always be an authority to the sheriff to sell, though the return day be passed.

*Semble:* that where a sheriff under these circumstances returns to the writ of *ven. ex.*, that "he is unable to sell," he may be liable to an action for a false return, but he cannot be attached.—Bank of Upper Canada v. McFarlane et al., 396.

*Attachment. Costs.*] *Semble:* that where the sheriff returns a writ before the attachment issues, but not within the time limited by the rule, he can only be relieved upon payment of costs.—The Bank of Upper Canada v. McFarlane et al., 396.

*Demurrer. Exceptions not noticed in Books.*] Where exceptions to pleadings are not noticed in the demurrer books delivered, nor any notice of them given in to the court before the argument, they cannot be urged.—Ferrie et al. v. Lockhart, 477.

*Amendment at Nisi Prius. Ejectment.*] *Semble:* that where an amendment is allowed at Nisi Prius, it should in fact be made before the verdict is recorded.

Where a demise in the declaration of ejectment is laid as joint, and the evidence shews a tenancy in common, the judge at Nisi Prius has not the power under the statute 7 Will. IV., ch. 3, of allowing an amendment.—Doe dem. Cuvillier et al. v. James, 490.

*Fi. Fa. Death of Defendant.*] If a writ of *fi. fa.* be tested in the lifetime of the debtor, it may be taken out and executed after his death.—Doe dem. Hagerman v. Strong et al. 510.

*District Court. Appeal from judgment by Writ of Error.*] Where the district court makes an order or pronounces a judgment, from which either party can appeal under the 57th clause of the 8 Vic., ch. 13, that is the method of appeal the party must follow, and not by writ of error.—Thomas v. Hilmer, 527.



*Remittitur damna.*] Where a verdict has been given for the plaintiff in the district court for a sum beyond its jurisdiction, the plaintiff may cure the defect by entering on the record a remittitur for all damages beyond its jurisdiction.—*Thomas v. Hilmer*, 527.

## POLICY OF INSURANCE.

*Concealment or omission of facts.*] Where a party assuring a vessel omits to mention to the underwriters that she has *then* sailed, the omission, though the assured knew the fact, will not vitiate the policy, unless the vessel be at the time of the insurance what is called "a missing ship." *Aliter*: if the assured, when *expressly questioned* as to the fact, says, not by *way of opinion or expectation* but positively, that the vessel has not yet sailed when she really has.

*Semble*: that there is a distinction to be taken when the owner of the cargo, who is not at the same time the owner of the vessel, is insuring his cargo, as to the probability of any positive statement being made to the underwriters with respect to the time of the vessel sailing.—*Perry v. British America Fire and Life Assurance Company*, 330.

## PRINCIPAL AND AGENT.

*Right of Principal to sue on contract by Agent.*] *Semble*: that a principal, for whose benefit a contract was made by his agent, may sue the defendant in his (the principal's) own name, though the defendant may have known nothing of the principal's interest in the subject matter of the contract at the time.—*Mair v. Holton*, 505.

## PROMISSORY NOTE.

*Notice of Dishonour.* *What sufficient notice.*] A notice of the nonpayment of a bill or note, when deposited in the post-office of the city of To-

ronto for any indorser residing there, is as good a notice as if it had been left at the endorser's residence by a special messenger.—*Commercial Bank v. Eccles*, 336.

*For debt of third party.* *Consideration.*] A promissory note given by A. to B. for a debt due by C. upon no consideration of forbearance, and upon no privity shewn between A. and C., cannot be enforced.—*McGillivray v. Keefer*, 456.

*Notice of Dishonour.*] What is or is not sufficient notice of dishonour of a bill or note, when the facts are undisputed, is a question of law.

The holder of a bill or note need not shew the notice of dishonour to have been absolutely received—due diligence in sending it is sufficient.—*Bank of Upper Canada v. Smith*, 483.

*Notice of dishonor, dispensation of.*] Whenever the indorser of a note writes to the holder, for the purpose of inducing him to believe it unnecessary to give him the regular notice of non-payment by the maker, especially when he states the maker to be insolvent, such letter, though written before the note has arrived at maturity, will be construed by the court as a dispensation of notice.—*Beckett v. Cornish*, 138.

*Foreign language. Pleading.*] In declaring on a note drawn in a foreign language, and where a foreign word is used, its meaning in English may be averred without any introductory statement that such word is of such a language and of such a signification in English.—*Gibb v. Morissette*, 205.

## PRISONER.

*Weekly Allowance. Attachment.*] The court will order the weekly allowance to a plaintiff or defendant imprisoned on an attachment for non-payment of costs.—*Doe dem. Vancott v. Reid*, 125.

## PRIVILEGE.

*Parties to suits.*] The court will not set aside the service of process for irregularity, upon the ground that it was served on the defendant while he was attending at the assizes as plaintiff in a civil suit pending and entered for trial.—*The City of Kingston v. Brown*, 117.

## RECEIPT.

*Not conclusive.*] A receipt given and accepted for the delivery of flour is not conclusive upon the party accepting it.—*Mair v. Holton*, 505.

## RELIGIOUS SOCIETY.

*Conveyance to Trustees. Registration.*] Under the provincial statute 9 Geo. IV. ch. 2, sec. 3, a deed conveying land to trustees for the use of a religious society is invalid for want of registration.—*Doe on the several demises of Bowman et al. v. Cameron et al.*, 155.

## REPLEVIN.

*Distress. Lease. Stranger to lease.*] A. demises to B. for a certain term. B., during the term, absconds and abandons the property, leaving no one to occupy it. C., finding the place vacant, puts a person in possession, and makes a demise to D. A. distrains for rent under his lease to B. *Held per Cur.*, distress legal.—*Rudolph v. Bernard*, 238.

*Agreement to allow deduction from rent, for work, &c.*] A landlord agreed with his tenant, that if he should not paint the tavern outside, and the sheds and driving-house, &c., in 1843, the tenant might do it in 1844, and charge it against the rent of 1845. The landlord did not paint; the tenant only began to paint in June, 1845, during which month he painted one side and two ends of the tavern, but had not finished painting any of the buildings on the 12th of July, 1845, when the landlord distrained for a

quarter's rent, due on the 1st of July, 1845. *Held per Cur.*, that under the terms of the lease with respect to the painting, the landlord might distrain on the quarter's rent due on the 1st of July, 1845, though the painting which had been then begun but not completed exceeded the quarter's rent for which the landlord had distrained.—*Milmine v. Hart*, 525.

## REGISTRY.

*Postponement of unregistered deed. Trustees, &c.*] In order to postpone a prior deed on account of non-registry, evidence must be given at the trial, to shew the title a registered one before the prior deed was given. The second clause of the registry act does not apply to deeds given to trustees for the benefit of creditors.—*Neeson v. Eastwood*, 271.

## RE-REGISTRY.

A., the grantee of the crown, conveys to B. B. conveys to C. The conveyance from B. to C. is registered in the Niagara District, before the war of 1812. The record of registration is burnt during the war. C.'s deed is not re-registered, according to the provisions of the 56 Geo. III., ch. 16. C., after the war, conveys to D., who does not register his deed. C. conveys again to E., without consideration, who registers. E. conveys to F., for a valuable consideration, who also registers.

*Held*, that C.'s not having re-registered his title, in compliance with the provisions of the statute 56 Geo. III., ch. 16, had not the effect of securing the title to D., by making C.'s title an *unregistered title* at the time of his conveyance to E.

*Held also*, that F. having given a valuable consideration for his deed to E., the fact that E. had given no value for his deed to C. would not defeat the operation of the Registry Act, 35 Geo. III., ch. 5, in favour of F.'s registered title, as against D.'s

prior unregistered one.—Doe dem. Matlock v. Disher, 14.

### SHERIFF.

*Notice to Clerk.*] A plaintiff's attorney giving notice to a *sheriff's clerk* that A. and B. are jointly interested in certain goods, and pointing to a deed in his possession which he says shews the joint interest of the parties, and directing the sheriff to sell that joint interest, is not *necessarily* a notice which will bind the sheriff in the execution of the writ.

*Semble* : that the *duties* of the clerk to whom the notice was given, and the whole circumstances of the case, must be considered, in determining under the notice the liability of the sheriff.

If the plaintiff's attorney gives at different times two wholly *inconsistent* notices to the sheriff: *Semble*, that the sheriff is not bound to obey either the one or the other.

*Quere*. What course is the sheriff to pursue upon an execution against the goods of one of two partners, under the circumstances of one being a bankrupt and the other not.—O'Neill v. Hamilton, sheriff, 294.

*Return of writ by deputy.*] A sheriff is bound by the return to a writ of *fi. fa.* against goods, made in his name by a person who, though deputy sheriff at the time when he signed the sheriff's name to the return, was not deputy until after the writ was returnable.—Baby v. Foott, sheriff, 349.

*Trespass. Must plead fi. fa.*] Where, in an action of trespass against the sheriff for seizing and taking away goods, the plaintiff proves that the defendant took the goods *out of his actual possession*, the defendant cannot give evidence of his legal authority to seize them under a *fi. fa.*, without pleading it.—Pollock et al. v. Fraser, sheriff, 352.

*Ven. ex. False return.*] Where a levy is made by the sheriff under a writ of *fieri facias*, and he returns goods on hand for want of buyers, and a writ of *venditioni exponas* is then sent to the sheriff, that writ will always be an authority to the sheriff to sell, though the *return day* be *passed*. *Semble* : that when a sheriff, under these circumstances, returns to the writ of *ven. ex.*, "that he is unable to sell," he may be liable to an action for a false return, but he cannot be attached.—The Bank of Upper Canada v. McFarlane et al., 396.

*Attachment. Costs.*] *Semble* : that when the sheriff returns a writ before the attachment issues, but not within the time limited by the rule, he can only be relieved upon payment of costs.—The Bank of Upper Canada v. McFarlane et al. 396.

*Bond from Deputy to pay Sheriff a salary.*] A bond given to secure a sheriff a certain fixed salary, or otherwise, to be paid by his deputy, is void.—Foott v. Bullock, 480.

*Action for escape.*] In action against the sheriff for the escape of A., arrested on a case at the suit of the plaintiff, the declaration averred "that A. was indebted to the plaintiff in a large sum of money, to wit, &c., *upon and in respect of certain causes of action before then accrued* to the plaintiff against the said A., &c." The defendant pleads, denying that A. was indebted to the plaintiff in manner and form as the plaintiff alleged. *Held per Cur.*, that under these pleadings the plaintiff would be entitled to recover, if he shewed that any debt accrued to him against A. before he sued out the writ; also, that it was not open to the sheriff to set up technical objections in regard to forms of action and points of practice, having nothing to do with the fact of the existence of a debt, which perhaps the debtor A. might have



urged in the original suit.—O'Reilly v. Moodie, sheriff, 266.

*Adverse claim. Indemnity.*] A sheriff, wherever there is an adverse claim to goods, as between the execution debtor and a third party, may take an indemnity bond from either one or other, or both the parties.—Thomas, sheriff, v. Johnston et al., 110.

*Indemnity bond. Liability of Obligors.*] Upon an indemnity bond to the sheriff, the obligors must save the sheriff harmless, by taking the defence of any action against him upon themselves; and judgment against the sheriff is conclusive against the obligors.

Notice to the obligors, by the sheriff, of his being sued, is not necessary to give him a right of action against them.—Thomas, sheriff, v. Johnston et al., 110.

*Attachment. Escape.*] A sheriff is liable to an action for the escape of a party attached for contempt of court, in not performing an award; and it is not necessary, in order to this action, that the party should be brought up on the return of the writ of attachment, and formally committed by the court.

To an action against the sheriff for the escape of a party attached for non-performance of an award, he will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award. He cannot go behind the order authorising the attachment.—Huntley v. Smith, sheriff, 181.

*Duty of Sheriff. Ca. re. bailable.*] When a bailable *ca. re.* is delivered to the sheriff, he is bound to proceed with due diligence in the arrest of the party.

If a jury, upon being charged that they were not to find for the plaintiff unless they were satisfied that there

had been neglect on the part of the sheriff, from which the plaintiff had suffered *some* damage, return a nominal verdict in favor of the plaintiff, the court will refuse to set it aside, upon the ground that, to sustain even a verdict for nominal damages for not arresting a defendant upon *mesne process*, some clear proof of an injury received from the neglect to arrest should have been given by the plaintiff, and that no such evidence was offered.—O'Connor v. Hamilton, sheriff, 243.

### SHERIFF'S DEED.

*Registry.*] The provisions of the Registry Act are as much applicable to sheriff's deeds given to purchasers at sheriff's sales as to any other description of conveyance.—Doe dem. Brennan v. O'Neill, 8.

### SHERIFF'S SALE.

*Purchaser at, Ejectment by. Proof of title against Servant of Execution Debtor.*] A purchaser at sheriff's sale, as the plaintiff in an action of ejectment against a defendant who is in possession not as claiming any interest under a title independent of the debtor, or under any title, but as a mere servant of the debtor, is not held to stricter proof of title against the servant in possession, than he would be against the debtor himself.—Doe dem. Lyon v. Legè, 360.

*Lands.*] The fact that the whole of a farm may have been sold by the sheriff, for a debt which one would suppose might have been satisfied by the sale of only a portion of it, is no ground to invalidate the sale.

After land has been sold under a writ *valid upon the face* it, though the judgment upon which the writ issued may be reversed for error appearing upon the record, yet the defendant in the execution can only be restored to the money, not to the land.

It is no objection to a sale under

a *fi fa.* from the district court, that the writ directs a sum beyond the jurisdiction of the district court to be levied, which is stated in the writ to have been recovered for damages *and costs.*

*Quære.* Would the writ and sale be void, if it had been stated in the writ that a sum exceeding the jurisdiction of the court had been recovered for *damages only.*—Doe dem. Hagerman v. Strong et al., 510,

### STATUTES.

4 & 5 Vic., ch. 25.] A party cannot be prosecuted under our Criminal Statute, 4 & 5 Vic., ch. 25, for stealing fruit "growing in a garden," unless the bough of the tree, upon which the fruit is hanging, be within the garden. It is not sufficient that the root of the tree be *within* the garden.—McDonald v. Cameron, 1.

*Registry Act. Sheriff's Deeds.*] The provisions of the Registry Act are as much applicable to sheriff's deeds, given to purchasers at sheriff's sale, as to any other description of conveyance.—Doe dem. Brennan v. O'Neil, 8.

56 Geo. III., ch. 16. *Re-registration of Title. Niagara District.*] A., the grantee of the crown, conveys to B., B. conveys to C. The conveyance from B. to C. is registered in the Niagara District, before the war of 1812. The record of registration is burned during the war. C.'s deed is not re-registered according to the provisions of the 56 Geo. III., ch. 16. C. after the war conveys to D., who does not register his deed. C. conveys again to E. without consideration, who registers. E. conveys to F. for a valuable consideration, who also registers.

*Held,* that C.'s not having re-registered his title in compliance with the provisions of the statute 56 Geo. III., ch. 16, had not the effect of securing

the title to D., by making C.'s title *an unregistered* title at the time of his conveyance to E.

*Held also,* that F. having given a valuable consideration for his deed to E., the fact that E. had given no value for his deed to C. would not defeat the operation of the Registry Act, 35 Geo. III., ch. 5, in favour of F.'s registered title, as against D.'s prior unregistered one.—Doe dem. Matlock v. Disher, 14.

*Taxes.* 8 Vic. ch. 22.] A sale of lands made before the passing of the 8 Vic. ch. 22, in the District of Colborne, one of the new districts, for arrears of taxes, part of which had accrued due before the division of the District of Newcastle, is a legal sale.

The statute, 8 Vic., ch. 22, is a declaratory act, retrospective as well as prospective.—Doe dem. The Earl of Mountcashel v. Grover, 23.

*Forfeiture. Waiver and Continuance. Amendment. Effect of Recital.*] *Semble:* that where an act of the legislature has become forfeited by a non-fulfilment of some of its conditions, the legislature may waive the forfeiture, and by special enactment continue the existence of the act.

*Semble also:* that when an act amending an original act *recites* that it has been granted upon the prayer of the parties interested in the original act, it must be taken upon the recital as conclusive, that each individual interested in the original act was concurring in the passing of the amended act.—The City of Toronto and Lake Huron Rail Road Company v. The Hon. George Crookshank, 309.

*Statute of Limitations. Absence of Plaintiff. Agent in the Province.*] The defendant pleads the Statute of Limitations, the plaintiff replies absence in England, the defendant rejoins that the plaintiff has had an agent in the province transacting his business,

and that he might have sued. *Held, per Cur.*, that this rejoinder could not give the defendant the benefit of the statute.—*Lane v. Stennett*, 440.

*District Council. Implied Assumpsit.*] The 43rd clause of the District Council Act, 4 & 5 Vic. ch. 10, does not subject a district council to be sued *upon an implied assumpsit*, by reason of any transaction that may have occurred between the plaintiff and the justices in quarter sessions, or the treasurer of the district, before the existence of the council.—*Low et al. v. Ottawa District Council*, 194.

### SURRENDER.

*Of Lease, by conveyance in fee.*] A conveyance in fee from a lessor to his lessee during the term, though made to defraud creditors and voidable as to them, is nevertheless, as between the lessor and lessee, a merger of the lease, or more properly a surrender of the term, and entitles the purchaser at sheriff's sale of the lessor's estate in the land to immediate possession.—*Doe dem. McPherson v. Hunter*, 449.

*Quare*, as to the right of the purchaser at sheriff's sale to set up the deed in the first place as *valid quoad* the lessor and lessee, and then, in the second place, to repudiate the deed as *invalid quoad* the execution creditor.—*Ibid.*

### TAXES.

Where taxes have accrued upon the *whole* of a lot of land, while it is undivided, and a distress can be made upon *part* of the lot, no portion of the lot can be sold for such taxes.—*Stafford v. Williams*, 488.

A sale of lands, made before the passing of the 8th Vic., ch. 22, in the District of Colborne, one of the new districts, for arrears of taxes, part of which had accrued due before the division of the District of New-castle, is a legal sale.

The statute 8 Vic., ch. 22, is a

4 b

declaratory act, retrospective as well as prospective.

McLean, J., *dissentiente*.—*Doe dem. The Earl of Mountcashel v. Grover*, 23.

### TORONTO & LAKE HURON RAILROAD COMPANY.

*Right to sue stockholders.*] The City of Toronto and Lake Huron Railroad Company have, under the operation of the act 8 Vic. ch. 83, amending the original act 6 Wil. IV. ch. 5, a right to sue in debt one of the original stockholders, for an instalment due upon the stock *originally* subscribed and called in by the directors appointed under the original act of incorporation.—*The City of Toronto and Lake Huron Railroad Company v. the Hon. George Crookshank*, 309.

### TENDER.

*Trover. Lien.*] A. sends a waggon to B., to make the wood work. B., having finished, sends the waggon, in A.'s name, to a blacksmith, for the iron work. B. gets the waggon back from the blacksmith. A. calls for the waggon. B. allows him to remove the box of the waggon from his shop into the highway; but, on his returning to the shop to take out the running part of the waggon, B. refuses to let it go, till he is paid his bill. A. holds in his hand a quantity of notes, and offers to pay B. his demand if he would tell him what it was. B. would not name any sum, and insisted upon detaining the waggon. *Held*, that B., by sending the waggon to the blacksmith's, had not lost his lien, but that the lien revived upon his again obtaining possession of the waggon. *Held* also, that B. allowing A. to remove the box of the waggon into the highway, was no waiver of his lien. *Held* also, that it was for the jury to determine whether B. had not had full opportunity of seeing that A. was tendering him a sum



sufficient to meet his demand; and if the jury were satisfied that he had, then that the tender was a good one, notwithstanding B. had refused to name the specific amount of his bill.—*Milburn v. Milburn*, 179.

### TOLL-GATE KEEPER.

3 Vic. ch. 53. *Illegal tolls. Summary conviction.*] When tolls fixed by the commissioners are exacted by a toll-gate keeper, at a gate not six miles apart from the one previously passed, the toll-gate keeper, under the 34th sec. of 3 Vic. ch. 53, is not liable to summary conviction.—*The Queen v. Brown*, 147.

### TRESPASS.

*Trespass, right to sue for.*] A., living abroad, sends to an agent in this province to purchase a lot of land for the use of B., who was living in the province, and to take the conveyance to himself (A.) This is done, and B. is put in possession of the land, who, from henceforth, uses and cultivates it for his own benefit. At the time of the purchase, a crop of wheat was on the ground. *Held*, that B. and not A. should sue in trespass for cutting and carrying away the wheat. *Quære*: Did the property in the wheat belong to A. or to B.—*Campbell v. Cushman*, 9.

*Right to cut trees. Limited right.*] Where a plaintiff has the right to cut a limited number of trees upon land, and not the exclusive right to cut all the trees, he has not that possession of the land which will entitle him to bring an action of trespass *quare clausum fregit*.—*Monahan v. Foley et al.*, 129.

*Pleading. Costs.*] The plaintiff sues in trespass, in one count, for breaking and entering his house and taking goods. The defendant justifies the breaking and entering in one plea, and in another plea he denies

the goods to be the plaintiff's. The defendant has a verdict upon the first plea, and the plaintiff upon the second for 30s. *Held*, that the plaintiff was entitled to judgment in the action, and to the costs of the cause.—*Evans v. Kingsmill, sheriff, &c.*, 132.

*Sheriff. Joint trespass.*] Where the plaintiff (defendant in a capias) sues the sheriff and the plaintiff in the writ arresting him, as *joint trespassers*, he must take care that his record of the pleadings does not shew him to be proceeding against the sheriff for one act of trespass and against the plaintiff in the writ for another act of trespass. When the record does shew this, the court will set aside a verdict obtained by the plaintiff against both the defendants, on the issues raised.—*Eccles v. Moodie, sheriff, and Barry*, 250.

*Stranger. Bailiff executing fi. fa.*] If a stranger, having no legal process, goes to a defendant in execution and takes down in his presence a list of his goods, and tells him he must not remove them, and does nothing more, he cannot be sued in trespass. So if, instead of a stranger, a bailiff has so acted under legal process, he may have bound the property as against other writs, but he cannot be sued in trespass, as he has neither removed, nor detained, nor handled the goods.

The writ of *fi. fa.* and warrant to the bailiff must be proved, or its non-production accounted for, in order to charge the plaintiff in the execution with an act of trespass committed by the bailiff.—*Cameron v. Lount*, 275.

*Pleading. Leave and license.*] Trespass to south parts of lots Nos. 14 and 15, laying an *asportavit*, and conversion of a quantity of wheat and straw of the plaintiff. Plea. Leave and license generally. In support of this plea the defendants proved a deed, made by the plaintiff, 20th

February, 1846, whereby, in consideration of 28*l.* acknowledged to have been received from the defendant, Turner, he "bargained and sold" to him, among other things specified, all and singular twenty acres of wheat then growing and being on the south part of lot 14, in the 3rd concession of Brantford, and in the possession and occupation of the grantor, Lunn, to hold the said twenty acres of wheat to him the said Turner, his heirs, executors, administrators and assigns, for ever, without any claim or hindrance of any person whomsoever, and without any account to be thereafter rendered, so that neither the said Lunn, nor any one in his name, should claim or demand any right or interest in the said twenty acres of wheat, or any part thereof, at any time thereafter, but shall, from all actions and demands therefor, be wholly debarred and excluded; and by the same instrument, the said Lunn, "all the said twenty acres of wheat, with the right of ingress, egress and regress, into, upon and from, the said lot No. 14, to protect, harvest and remove, the said twenty acres of wheat, at the option and discretion of him the said Turner, his executors, &c., unto him the said Turner, his executors, &c., against all and every other person or persons shall and will warrant and for ever defend." Then followed a proviso, that if Lunn should pay to Turner 28*l.*, with interest, on a day named, 20th June, 1846, then the deed should be void. Turner on his part covenanted to pay the money; and it was stipulated, until default made, Lunn might enjoy and retain in his possession and use *the goods* and premises above bargained and mortgaged, as aforesaid, unless he should at any time before the day of payment be sued or prosecuted by any other person whatever, in which case Turner was to be allowed to

take and enjoy the said goods and chattels, as of his own property.

*Held per Cur.*, that the defendants must fail under their general plea of leave and license, the deed giving no right of entry on lot 15, a trespass that had not been denied; no general issue being pleaded. *Semble*: that if they could have derived from their license to enter on lot 14, a right to enter on lot 15, as being necessary, in order to enable them to enjoy the privilege granted with respect to lot 14, they should have in a special plea set forth the *necessity*.

*Held* also, that the defendants must fail upon their plea of license, as the license conveyed by the deed was not to enter and take *the plaintiff's wheat*, but to enter for the purpose of taking *the defendants' wheat*, which the plaintiff had assigned to them, and which was growing on the plaintiff's land.

*Semble* also, plea bad, as the license proved was *conditional* and not absolute. There should have been a special plea, shewing default in the payment of the money by plaintiff on the day named.

*Semble* also, that the only right the deed gave the defendants, was to cut and carry away *the wheat* of the plaintiff. The defendants had no right to enter on the plaintiff's land and take the wheat away by force, after it had been cut and stacked by plaintiff.—Lunn v. Turner et al. 282.

#### TROVER.

*Title deeds.*] Trover as well as detinue, may be maintained for leases or other title deeds.—Anderson v. Hamilton, 372.

#### VERDICT.

*Torts. Excessive Damages.*] In actions for torts, the court will not set aside a verdict for excessive damages, except upon very clear and manifestly strong grounds.—McDonald v. Cameron, 1.

## WEEKLY ALLOWANCE.

*Attachment for non-payment of costs.*] The court will order the weekly allowance to a plaintiff or defendant imprisoned on an attachment for non-payment of costs.—Doe dem. Vancott v. Reid, 125.

## WITNESS.

*Competency. Trespass. Sheriff.*] In an action of trespass brought against a sheriff for seizing the plaintiff's goods, under an execution against the goods of A. *Held per Cur.*, that A. (the defendant in the execution) was not a competent witness for the sheriff, to prove that he (A.) and not the plaintiff was the owner of the goods.—Robinson v. Rapelje, sheriff, 289.

*Opinion of, as to Handwriting. Rejection of Evidence.*] A defendant's counsel, in order to obtain from a witness an opinion as to the handwriting of a plaintiff's receipt in full to the action, proposed to put into his hands other papers purporting to be signed by the plaintiff, *but in no way connected* with the cause. The learned judge at Nisi Prius objected to this course, and would not admit of the witness being examined as to *the other writings*, till he had first, from his own recollection of the plaintiff's handwriting, given an opinion upon the signature of the receipt. *Held, per Cur.*, on notice for a new trial, that the learned judge had properly refused to admit the evidence.—Gleeson v. Wallace, 245.

## WILL.

*Testator dying abroad. Registration of.*] By the operation of the Registry Act 35 Geo. III. ch. 5, sec. 2, the devisee claiming under a will *made abroad*, and where there has been no "inevitable difficulty" in the

way of registering, is not allowed a period of six months, within which to register the will; so that if the heir to the testator conveys for value, and his grantee registers at any time prior to the registry of such a will, the title is lost to the devisee.

*Quære*: as to the effect of the act 35 Geo. III. ch. 5, in registering the wills of persons dying abroad. By the recent act 9 Vic. ch. 34, sec. 2, all devisees, *without exception* as to the will being made abroad, or the testator dying abroad, are allowed twelve months within which to register the will.—Doe dem. Eberts and wife v. Wilson, 386.

*Construction of. Vesting of estate.*] *Held per Cur.*, upon the following will, devising certain lands to the testator's wife, for life, "and *after her decease then unto her son*, William Cumming, his heirs and assigns for ever, provided that the said William Cumming will pay all such demands as may be against the said William Cumming, by his having signed any promissory note or notes, with his said son William, or any other sum or sums of money that he might be owing on account of his said son William; and if his said son William should make default in paying all such demands as aforesaid, or if any part thereof should be collected from any devisee in this said will mentioned, then and in that case he devised the said land unto his daughter Margaret, her heirs and assigns for ever"—that William Cumming, the son, took a vested estate in remainder, with a conditional limitation, over to his sister, in case of a certain event happening, and that such estate of William could be sold at sheriff's sale, under the 5th Geo. II. ch. 7, during the lifetime of his mother.—Doe dem. Jarvis v. Margery Cumming, 390.

12

933-4













**University of Toronto  
Library**

---

**DO NOT  
REMOVE  
THE  
CARD  
FROM  
THIS  
POCKET**

---

**Acme Library Card Pocket  
LOWE-MARTIN CO. LIMITED**

